the HUMAN LIFE REVIEW

FALL 2009

Featured in this issue:

Also in this issue:

Wesley J. Smith • David van Gend
Archbishop Timothy Dolan

Published by:

The Human Life Foundation, Inc.

New York, New York

Vol. XXXV, No. 4 $7.00 a copy

About this issue . . .

. . . when I asked our proofreader what she thought after perusing the articles herein, she said the word "frustrated" came to mind, that "reading Bissonnette ("Abortion: Conscience, Crisis, and the Church," p. 12), and Roden ("Cellulose Persons & Other Straw Men," p. 47) and Linton ("A Fool's Errand: State 'Personhood' Proposals," p. 61)—those three especially—with their casting around for successful strategies, and their occasional almost snappishness, gave me a sense of the current frustration of pro-lifers about what to do next, how to move forward in the Obama era." John Burger, in "Do Pro-lifers Need to Get 'Organized'?" (p. 25), reports on one strategy for moving forward, while William Gouveia, Jr.—a new contributor we welcome in this issue—looks back at history to find another ("Contract and Covenant: Religion in the Abortion and Abolition Debates," p. 29). Meanwhile recent polls show a majority of people identifying themselves as pro-life, and recent skirmishes in the House and Senate over abortion funding in health-care legislation suggest more Americans are rejecting the abortocratic culture Democrats are hell-bent on expanding (see William Murchison's "The Ugly Mark of Roe," p. 5). While Obama may have seemed unstoppable at Notre Dame in May, after a summer of Tea Parties and the fall emergence of a powerful pro-life *Democrat*—Michigan representative Bart Stupak, whose success in banning abortion funding from the House health-care bill stunned just about everyone—his anti-life progress is no longer so certain. Even the sell-out of the erstwhile Stupak of the Senate—Ben Nelson of Nebraska, now down 30 points in the polls—doesn't guarantee final passage of ObamaCare. As we write, congressional abortocrats are desperately casting around for successful strategies. And snappish doesn't begin to describe their foul demeanor. "There will be an outcome of some kind," writes Murchison about the health-care debate, and "I will look silly indeed in the rear-view mirror if I make assumptions that simply don't materialize." He's right about that, of course, but I'd venture that whatever the outcome, the pro-life movement will move forward with gusto as more and more people troubled by the killing of innocents are emboldened by the courageous example of Mr. Stupak to speak out (and vote out of office politicians like Nelson who lack the courage of their convictions). Fr. Richard John Neuhaus, whose death nearly a year ago left most pro-lifers feeling bereft, remained a registered Democrat to the end, a sign perhaps that he hadn't abandoned hope for the party that even today laughably claims to protect the most vulnerable among us. Mr. Stupak's fearless determination to turn back the abortion juggernaut—"If it costs me my seat, so be it," he told C-SPAN last October—suggests there may be some hope after all. I suspect Father Neuhaus would be pleased.

Anne Conlon
Managing Editor

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Fall 2009

Vol. XXXV, No. 4

Published by The Human Life Foundation, Inc. Editorial Office, 353 Lexington Avenue, Suite 802, New York, N.Y. 10016. Phone: (212) 685-5210. The editors will consider all manuscripts submitted, but assume no responsibility for unsolicited material. Editorial and subscription inquiries, and requests for reprint permission should be sent directly to our editorial office. Subscription price: $25 per year; Canada and other foreign countries: $35 (U.S. currency). ISSN 0097-9783.

INTRODUCTION

With this issue we complete 35 years of publishing our journal. When my late father, James P. McFadden, founded the *Human Life Review* in 1975, he believed that a decision as bad as *Roe* v. *Wade* must and could be overturned—*soon*, he hoped. But whether or not that happened in the short term, there was one thing J.P. insisted was crucial: We must not let the abortion issue go away; we must keep it in the public consciousness. And, referring to the *Review*, he wrote: "There has to be a record. We won't be like Nazi Germany. No one should be able to say, whatever happens, that they didn't know what's actually going on here." With all the anti-life horrors of the last 37 years since the 1973 *Roe* decision—all the slippery-slope scenarios "they" said would never happen, from infanticide, to assisted suicide and euthanasia, to cloning and embryonic stem cell research—what we *can* say is that the abortion issue has *not* gone away.

We are also closing our first year being "pro-life in the time of Obama." Abortion, as William Murchison reports in his lead article, has emerged as an issue "front and center" in the debate on health-care reform. He writes: "The Obama White House seems to have been caught off guard by the uprising against House Democrats' desire to spend taxpayer money on weeding out the unwanted." Murchison gives us a helpful summary of abortion in the congressional debate as of early December—of course much more will develop before you get this, but it is clear, as he writes, that "abortion has become a principal element in the health-care debate—much to the dismay of the abortion-is-here-to-stay-so-get-over-it crowd."

The advent of "Obamacare" has caused a ratcheting up of anti-abortion activism, and there are renewed debates among those who seek the end of legal abortion about how best to proceed. Several of our authors in this issue give their views. Starting them off is Joe Bissonnette, in "Abortion: Conscience, Crisis and the Church," a provocative article that may well draw vigorous response. Bissonnette writes that some arguments used by pro-lifers in the past decades have been "disingenuous," and that pro-lifers have failed to be bold enough in calling abortion what it is—murder—"for fear of precipitating a crisis." Bring it on, he argues: The "resolution of abortion is not likely to take the bloody trajectory of the resolution of slavery," and we must "boldly call abortion murder and call for the imprisonment of abortionists and parents who abort their babies, because this will create a new starting point for the abortion debate in the media and among politicians."

Bissonnette concludes by calling on the churches of America to lead the fight. Following him is *National Catholic Register* news editor John Burger, who reports in "Do Pro-Lifers Need to Get 'Organized'?" (p. 25) on several new organizations which are actually taking a page from Barack Obama's book and embracing the concept of community organizing. One of them, Cherish Life Ministries, seeks to "get churches to lead people on life issues."

Next we welcome a newcomer to the *Review*, William Gouveia, Jr. who dis-

cusses "Religion in the Abortion and Abolition Debates." The abolitionist movement was inspired by religion, he writes, and the defenders of slavery *objected* to it on those grounds. The reader may find some parallels startling: For example, Stephen Douglas, in the famous debates with Abraham Lincoln, said he was "speaking of rights under the Constitution, and not of moral or religious rights" and that he did not care whether Americans chose freedom or slavery; all he cared about was the freedom to choose. (Sound familiar?) The key, writes Gouveia, is a balance—in a secular society we can't fight abortion by voicing theological principles, but we can use religiously informed arguments and appeal to the wider society on the basis of natural law and traditional western moral reasoning.

In our struggle to defend the unborn, we must take into account, writes our next author Richard Goldkamp, the intense degree of media bias on the issue. Considering it as he does, in a sort of summing up since *Roe*, it strikes one anew how flagrantly Orwellian mainstream media abortion coverage has been. And, to Bissonnette's point, Goldkamp reports on a 2006 Associated Press story surveying Americans' attitudes about abortion, which included this:

> "Most think that having an abortion should be a personal choice. But they also think that it is murder." Stop for a moment and savor that: A form of *murder* is supported by *most* Americans as a *personal choice*?

As Goldkamp writes: "That violent contradiction between the legal and moral values at stake here should speak for itself"—but sadly, it does not.

In the matter of how to fight abortion in the courts, whether or not to work for state "personhood" proposals is a topic of heated debate. We next have two articles from opposite camps. First, Gregory Roden argues, in "Cellulose Persons and Other Straw Men," that the federal government can and ought to declare the unborn child a person: Federal power is derived from the states, and "any truthful examination of state municipal laws shows unborn children to be persons within their jurisdiction." He concludes that a fetus is a person "within the language and the meaning of the Fourteenth Amendment." Paul Linton, next, says that state personhood proposals are a bad idea, and that pursuing them "will lead only to more pro-life defeats and demoralize the pro-life movement." Not only, he writes, are these attempts based on a "failure to recognize the hierarchy of the law"—the "federal Constitution is supreme and takes precedence over a conflicting state constitutional provision or state statute"— but even if a state personhood amendment were to pass, it might overturn "the entire body of law developed over the years regulating abortion."

We go now to a discussion of the legal and cultural battles being waged about the end of life, namely, assisted suicide and euthanasia. In "Eugenic Death-making and the Disabled," Mark Mostert, director of the Institute for the Study of Disability and Bioethics at Regent University, describes the ascent of eugenic euthanasia, including the "powerful form of activist influence known as the *propaganda of the*

deed." He also proposes strategies to push back, exhorting us to use the new tools literally at our fingertips—the Internet, "blogging," Facebook, etc.—to get our views across. Hearkening back to Goldkamp, if much of the media is also enamored with so-called death with dignity, it is up to us to counter that propaganda.

Jo McGowan, a columnist for *Commonweal*, mother of a disabled child and the founder of a school for special needs children in India, has written an interesting report (p. 83) about a case in India involving "Sexuality, Rights and the Disabled." The case, about whether or not a mentally-handicapped woman should be forced to abort her child, went to the Supreme Court, and the arguments put forth reveal that, McGowan writes, "disability is the 'last frontier' in the battle against discrimination and injustice." Mary Meehan passionately argues the same point in our last article, Part II of "Eugenics Triumphant in Prenatal Testing" (Part I appeared in our *Summer* issue). In the development of American eugenics, even immigrant American geneticists who were Nazi refugees and "rejected the ethnic and racial bigotry of eugenics, accepted its bias against people with disabilities. This contradictory attitude is still widespread today." Meehan writes about how the practice of genetic screening has become "routine" in pregnancy care, and that it causes enormous stress to pregnant couples, and leads to the abortions of countless children—90 percent of Down Syndrome diagnoses end in the baby's death. Meehan asks, only partially tongue-in-cheek, since eugenicists recommend abortion to cut down on the "extra" lifetime costs of the disabled: "Why, one might ask, doesn't anyone calculate the extra lifetime cost of eugenicists? We could count their high salaries, the palatial homes and upscale cars that some have, luxury vacations," etc.

* * * * *

We are honored to reprint, in *Appendix A*, Archbishop Timothy Dolan's *Catholic New York* column, "On the Front Lines for Life," in which he writes that "the most pressing life issue today is abortion. If we're wrong on that one, we're just plain wrong." In *Appendix B*, Wesley J. Smith alerts us to more disturbing news about health-care in the United Kingdom: the dangerous end-of-life protocol known as the "Liverpool Care Pathway." Finally, in *Appendix C*, Dr. David van Gend, the National Director of Australians for Ethical Stem Cell Research, explains why "scientists no longer have any compelling reason to attempt human cloning." The good news is, cloning has been "superceded by a technique so simple and powerful (and entirely ethical) that it has left the world of stem-cell research both stunned and elated."

Let us hope for more good news in the New Year; and in the meantime, thanks as always to Nick Downes, whose fiendishly clever cartoons refresh our spirits.

Maria McFadden
Editor

The Ugly Mark of *Roe*

William Murchison

Granted, willingly: It's always a tricky business, projecting the course of human events that await, shall we say, eventuation. That's another way of affirming the perils of writing about the health-care debate pending final congressional action.

As I write, the congressional debate is relatively fresh. Soon it will grow old, tired, sluggish, and stale. There will be an outcome of some kind—likely well before this article sees print. I will look silly indeed in the rearview mirror if I make assumptions that simply don't materialize.

Therefore I won't make such assumptions. I'll confine myself, after a little stage-setting, to remarking on the extraordinary way in which access to abortion has become a principal element in the health-care debate—much to the dismay of the abortion-is-here-to-stay-so-get-over-it crowd. Who would have thought it? Certainly not the Democrats who supposed that the health-care debate was merely about clamping federal controls on a sixth of the U.S. economy. Life is not so simple when below the political surface the question of Life itself, large and sprawling, can be glimpsed.

The abortion question was predestined to arise in a debate—"uproar" might be the more precise term—over the funding of health care. The U.S. government was set, so the Democratic party of Barack Obama hoped, to deploy taxpayer resources in the service of covering practically all Americans. The nature of the debate that unfolded hardly requires, at this stage, much recounting. Democrats flexed their new political muscle; Republicans recoiled at the idea that some hastily gotten-up federal plan might come formally to express understanding of what Americans need in the health-care line.

During the 2008 presidential election, Barack Obama had sided explicitly with the Democrats' pro-abortion constituency, which backed him with eager expectation. It was not to be anticipated that he would sign any health-care-reform bill that put abortion in a category different from any other medical procedure.

That was until the House bill-writing process brought Rep. Bart Stupak to the attention not just of his colleagues but of politics-watchers everywhere. Stupak, a pro-life Michigan Democrat, confounded Speaker Nancy Pelosi

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and her leadership team by insisting the legislation exclude coverage of abortion. Behind him stood a bloc of two score Democratic House members. Losing the whole health-care bill because of abortion was a prospect that sat poorly with even the House's large contingent of pro-abortion Democrats.

To cut to the chase, Stupak won. The House approved, 240-194, his amendment barring government financing of abortion save in cases of rape or incest, or to save the life of the mother. It was quite a stroke—swift, unexpected, and disruptive of the easy course Speaker Pelosi had hoped the bill would follow over to the Senate.

Republicans were overjoyed, not least at the discomfiture of their opponents. Democrats were predictably edgy if not outraged. The *New York Times*, which fervently supports abortion rights, called the amendment "an infringement of a woman's right to get a legal medical procedure and an unjustified intrusion by Congress into decisions best made by patients and doctors." Two days later, on the *Times*'s Op-Ed page, Kate Michelman and Frances Kissling unloaded. These two longtime proponents of virtually unlimited abortion accused Democrats of abandoning their platform and subordinating women's health "to short-term political success." "When it comes to abortion," they continued, "[Democrats] seem to think all positions are of equal value so long as the party maintains a majority. But the party will eventually reap what it has sown. If Democrats do not commit themselves to defeating the amendment, then they will face an uncompromising effort to defeat them, regardless of the cost to the party's precious majority."

Meanwhile Democratic senators were laboring over the same perplexity as their House counterparts: viz., how to advance health-insurance reform without losing the votes of Democrats with pro-life convictions, constituencies, or both. The Senate Democratic perplexity was all the more acute for lack of any margin of error. A single Democrat who peeled off and gave Republicans the vote necessary to sustain a filibuster would pull down the temple on all Democratic heads.

Majority leader Harry Reid, who is generally identified in the media as "pro-life," though one hardly ever hears him quoted on the subject, crafted a bill that conceded a little bit to both sides. No actual taxpayer money could be used for abortions; on the other hand, a woman could use her own money to buy a just-in-case policy. Planned Parenthood took a benevolent view of the provision, suggesting it was no worse than the Hyde Amendment, which for 30 years has blocked the use of federal money to pay for abortions. Stupak supporters said, nothing doing. The confrontation deepened and intensified. Abortion became over time one of two central considerations in the debate, the other being the so-called "public option" for health-insurance coverage.

Some analysts saw the encounter as much ado about less than you might think. "Only a small minority of women," wrote Stephanie Simon in the *Wall Street Journal*, "would find Stupak breathing down their necks." A 2001 study by the Guttmacher Institute showed, according to Simon, private insurance covering just 13 percent of abortions. Simon quoted abortion supporter Phillip Levine of Wellesley College as saying, "This is very much a political issue and a lot less about the substance of how many women will actually be affected."

Mark that last comment. We will come back to the matter anon.

In any case, the pro-abortion lobby wasn't taking chances. It geared up quickly for a brawl. On November 24, the *New York Times*'s David D. Kirkpatrick wrote: "Lobbying over abortion was turning into a sleepy business. But the health care debate has brought a new boom, and both sides are exploiting it with fund-raising appeals." Fifty-four organizations, in early December, had posted links to a website—"Stop Stupak!"—serving as a fund-raiser for Emily's List, which promotes and funds feminist candidates. Cecile Richards, president of Planned Parenthood (and daughter of the irrepressible feminist heroine Ann Richards, Texas's second woman governor), called the anti-Stupak reaction "phenomenal, like a match dropped on dry kindling."

No less delighted, by Kirkpatrick's account, was Marjorie Dannenfelser, president of the Susan B. Anthony List, which labors to cancel out the labors of Emily's List, by supporting pro-life women for office. "It is far and away in the history of our group," she said, "the biggest fulcrum of activism we have ever had." The Anthony List, reported Kirkpatrick, "is using [its new money] for automated phone campaigns in pivotal states and spending more than $130,000 on an advertising campaign aimed at [Reid], in his home state of Nevada."

And yet, Kirkpatrick said, "polls show that abortion ranks low among priorities in the health care overhaul"—just 8 percent seeing it as their top concern in the debate, according to the Pew Research Center. For that matter, says Pew, 46 percent of Americans who want health care enacted say government money shouldn't be used for abortion.

Well, you wouldn't have known it Dec. 8, when Democratic Sen. Ben Nelson of Nebraska decided to make his colleagues show their hole cards on abortion. Nelson introduced his own version of Stupak: no federal money for abortion, period; no private money either in any plan the government might set up. Confusion and tempers rose once more. "It is a shock to all of us," said Washington state Democrat Patty Murray, "that this [debate] has come down to an abortion issue." The Nelson amendment failed 54-45,with

Nelson and six fellow Democrats backing it, even as the two Republican ladies from Maine—Susan Collins and Olympia Snowe—crossed over to vote with the "pro-choice" Democrats. The "pro-life" Mr. Reid allowed as how health-care reform had nothing whatever to do with abortion. Yes, sure; nothing to do with the health of unborn babies. To this level of oily evasion the successors of the founding fathers have sunk. We don't really need to wait for the tumult and shouting to die away before taking a look around. Certainly we need not wait for some possibly up-or-down vote the Congress takes prior to a general slapping of foreheads as the members slump in exhaustion. Humiliation would be actually more to the point.

The health-insurance debate occurs at a moment of declining support for abortion: accompanied by, it is probably not too much to say, though quantification would be difficult, increasing jitters about what goes on in these shadowy places called abortion clinics.

A Gallup Poll last May found 51 percent of Americans willing to identify themselves as pro-life—"the first time a majority of U.S. adults," Gallup explained, "have identified themselves as pro-life since Gallup began asking this question in 1995." By contrast, 42 percent called themselves "pro-choice."

Gallup continued: "The new results represent a significant shift from a year ago, when 50 percent were pro-choice and 44 percent pro-life. Prior to now, the highest percentage identifying as pro-life was 46 percent, in both August 2001 and May 2002." Further, "about as many Americans now say the procedure should be illegal in all circumstances (23 percent) as say it should be legal under any circumstances (22 percent). This contrasts with the last four years, when Gallup found a strong tilt of public attitudes in favor of unrestricted abortion."

Arresting hunch on the pollsters' part: "It is possible that, through his abortion policies, [President] Obama has pushed the public's understanding of what it means to be 'pro-choice' slightly to the left, politically," possibly sending shivers up various spines in the Obama camp.

Early in October, the Pew organization, despite placing support for and opposition to no-holds-barred abortion in the same statistical range, bolstered Gallup's hunch. Pew said that "the abortion debate has receded in importance, especially among liberals. At the same time, opposition to abortion has grown more firm among conservatives, who have become less supportive of finding a middle ground on the issue and more certain of their own views on abortion."

We return at this point to the health-care brouhaha. A couple of points deserve mention, in my view. First, the more obvious of the two: Abortion abuts a vaster number of public and private concerns than the U.S. Supreme Court majority in *Roe* v. *Wade* could have contemplated. Welfare, crime,

family life, education, the economy—in the midst of each one arises the question of the presumed right to destroy unborn life. Now also health-care reform: front and center.

How can this surprise? All human questions and controversies touch human life. Abortion is in many senses the central question relating to human life—so urgent that the early Christians worked and worked until they changed the mind of civilization concerning the asserted right to destroy unborn life at will. The abortion question pops up everywhere, at every human intersection. The Obama White House seems to have been caught off guard by the uprising against House Democrats' desire to spend taxpayer money on weeding out the unwanted. To many Democrats abortion coverage under health care was just one detail amid so many more, like cost of policies, penalties for failure to acquire a policy, etc., etc. How indignant many were to find this little-bitty detail gumming up the grand mechanism of reform.

There is that aspect to the matter, and certainly we should notice. But there is an even larger aspect. It consists in kind of a grand cosmic recoil against those who argued and argued and argued, 40 or 50 years ago, for a political/judicial solution to the question of a woman's "choice."

When abortion became a public concern, in the 1960s, virtually all the states forbade the practice, consistent with the Christian teaching that life in the womb, at whatever point it begins, is Life. I did not say Christian teaching provided the motive for the ban. Many doctors insisted that abortion, being messy and dangerous, had no business as a health option and therefore should be legislatively prohibited. Their alarm was certainly consistent with Christian doctrine in rating the preservation of life as a higher priority than convenience or desire. The abortion laws came into the world, so to speak, with powerful pedigrees that the U.S. Supreme Court, in *Roe*, attempted to revoke.

The job looked easy enough: assemble the arguments necessary to capture the enthusiasm of five justices of the high court. (In the end, seven went along with *Roe*.) The proponents of *Roe* imagined they had wrought, by their witness and arguments, a moral revolution that the law merely appropriated. But that wasn't the case. In fact, the seven justices who voted to bring abortion-seeking women (and their doctors, of course) under constitutional protection had merely flip-flopped the politics of the case. An older regime of politicians, dating, in America, to the 19th century, had scowled on abortion. Guess what, folks. We were going to start smiling on it. The metaphysics and theology hadn't changed. The political-cultural balance of power had changed. It was enough to get the old abortion laws off the books and the collective will of seven justices put in their places.

Abortion, in other words, remained a topic over which lobbyists, lawyers,

and legislators had authority. An intensely moral/spiritual question had become, for public purposes, political. According to good democratic theory, pro-life people had no obligation whatever to shut their mouths and go underground, leaving supporters of the *Roe* regime in charge of the terrain. By implication, the *Roe* Court invited opponents of its decision to organize, raise money, form organizations, propagandize, and, ultimately, vote to counteract the decision.

We've since had—let's see, 37 years of organizing, money-raising, organization-forming, propagandizing, and voting aimed at the overthrow of *Roe*. It's what the Court asked for. That's my point. It's what the Court made inevitable by trying to cram a radical change in moral theology down the collective throat of a people used to thinking for themselves. There wasn't any way the Court, or its support base for *Roe*, was going to get away with such a tactic. It just wasn't going to happen in democratic, and ever-more-politicized, America.

Nor did it. The Stupak amendment—whatever its eventual form or fate in House and Senate—is no more than the most recent evidence that the great cram-down attempted by the *Roe* Court has failed. The *Roe* Court, Canute-like, commanded. The great sea of commitment to unborn life refused stubbornly to retreat. In fact, it swelled. That part, you could say, is good. Not so good—not nearly—has been our society's vast moral confusion over abortion, which results in large measure from its conscription as a political issue. The Supreme Court did that for us in *Roe* v. *Wade*. The issue never really was political in the past, notwithstanding the statutory protections that unborn life had gained through the political process. The statutes merely codified what society believed almost without self-examination.

Came the '60s and their tumults. Came feminism and *Roe* v. *Wade*. A new day had dawned. Once the Court had upheld the propriety of most abortions, the immediate problem, from a right-to-life standpoint, had but one solution. That is, the Court's politicized, sociologized decision had to be overturned. How? Through the instrumentalities of government, the Court being just one of those instrumentalities. Defenders of life were up against a political machine biased against all unborn babies—all, inasmuch as no baby was any longer to enjoy constitutional protection. Various counterstrategies asserted themselves, nearly all aimed at courting the Court and chatting up Congress through the time-tested methods: money-raising, campaign-organizing, poll-watching, vote-counting, march-organizing, placard-making. That meant, of course, money-raising on the other side; campaign-organizing, poll-watching, the works. It meant NARAL Pro-Choice America, Cecile Richards, and Kate

Michelman; it meant, on the other side of the ledger, the National Right to Life Committee, Marjorie Dannenfelser, and Congressman Bart Stupak.

It meant, in a more rarefied way, something sadder, more frightening: the dissolution of the pre-*Roe* moral climate, wherein, despite the normal outrages that human existence entails, the right to life enjoyed general purchase on human minds and consciences, and general recognition of its priority over other matters. For political considerations to overwhelm a moral climate by mere show of hands was—is—to turn the tables on moral thought. That was what happened. As a mere political issue the right to life became a bargaining chip or a rallying cry; a tactic; a stratagem. It could get people elected; it could also get them defeated.

The rules of the moral game having been overhauled and rewritten, little choice remains but to play by them. Case in point: the health-care fracas. Amendments; alliances; bills; TV interviews; fund-raising events. So life has come to work—possibly in punishment for our sins.

Or, again, maybe not. The story of Life achieves a prominence in our time that was lacking in decades when it hardly seemed necessary to affirm the God-given right to life. No longer. A politician can't speak these days; can't introduce a bill, much of the time; can't organize for reelection—without noting the ugly mark left by *Roe* on our moral countenance.

No medicine exists to smooth away that mark. No Act of Congress, no executive order, no course in political magic, is potent enough. It glowers glumly at us—and, of course, at the Creator of Life.

"I don't mean to be cruel, Janice, but, I am, so that's how it comes out."

Abortion: Conscience, Crisis & the Church

Joe Bissonnette

While being held in remand in Glenwood Springs, Colo., awaiting trial for rape and murder, serial killer Ted Bundy inquired about which states were most likely to execute for such crimes. Shortly thereafter, Bundy escaped and went to Florida, where he undertook another killing spree; it was there that he was again caught and finally executed.

Many commentators speculated about possible underlying motives. Perhaps Bundy sought a heightened sense of thrill in committing his crimes where the stakes were higher. But more interestingly, perhaps Bundy knowingly or otherwise wished to be stopped; perhaps he also wished to pay for his crimes.

Criminal-investigation dramas and true-crime shows remain a staple of TV. A recurrent premise in many of these shows, and a theory widely embraced by criminologists, holds that at some level criminals want to get caught and want to pay for their crimes. They often subconsciously leave clues that will lead to their apprehension. Perhaps they are seeking to resolve the cognitive dissonance of leading deeply conflicted lives. On one hand, the most mundane aspects of their lives, from the breath they draw and the food they eat to stopping at a red and going at a green, are ordered to the good. On the other hand, they secretly, furtively, choose to do great evil, and over time this becomes less of a choice, more of a compulsion: a second nature, but a second nature very much at war with their true nature. This cognitive dissonance begs for a resolution they themselves cannot achieve, and so they leave clues, fail to cover their tracks, do something to somehow bring it all to a close.

I like this theory; it rings true. And yet there is little evidence of this cognitive dissonance which begs for resolution in the millions of mothers and fathers who have aborted their babies or in the culture at large which obediently pays for abortion. I'm sure that post-abortion syndrome is real, but studies show that only 10 to 20 percent of women suffer severe long-term psychological effects. Given the gravity and scale of abortion, one would expect that it would be of an order and a magnitude that would overwhelm. It is not. Millions of mothers and fathers have aborted their children and then continued on with their lives.

Is the guilt-seeking-resolution theory ultimately untrue? Is it too eagerly

Joe Bissonnette, father of seven children, is a teacher, farmer, and freelance writer.

embraced by ethicists who appeal to natural-law theory and psychologists who idolize the notion of the psyche seeking integration? Or is conscience as much the product of nurture as nature, a cultivated awareness that augments the innate sense of right and wrong? Is a well-developed conscience necessarily informed by a morally enlightened culture? If the culture is not morally enlightened, will most individual consciences also be dark and underdeveloped?

This seems to have been the case throughout America's period of slavery. Thomas Jefferson and George Washington notwithstanding, there are comparatively few accounts of slave owners existentially riven by their participation in the constant and visible evil of persons reduced to property. While it's true that Washington and Jefferson were both in their ways singularly great Americans, the founding generation as a whole were also great. At the time of the founding and throughout the fragile first 100 years, Americans were arguably the best, the most literate, and the most principled people in the world—and yet many of them owned slaves, and thus had to live with, amid, and through the most glaring moral blindness.

And then it changed. Not all of a sudden, of course, but it changed. A hundred and fifty years later, no one is morally indifferent to, let alone in favor of, slavery. That 600,000 were killed in the Civil War many believe to have been the necessary price for the overcoming of slavery.

In his "House Divided" speech of June 1858, Abraham Lincoln set forth the framework for overcoming slavery:

> If we could first know where we are, and whither we are tending, we could then better judge what to do, and how to do it. . . . We are now far into the fifth year, since a policy was initiated, with the avowed object, and confident promise, of putting an end to slavery agitation. Under the operation of that policy, that agitation has not only, not ceased, but has constantly augmented.
>
> In my opinion, it will not cease, until a crisis shall have been reached, and passed. A house divided against itself cannot stand.

These are stunning words, and they are rightly famous. It is the sort of smart, clear-eyed assessment few would have had the insight to make and fewer still would have had the courage to express. Lincoln has often been likened to an Old Testament prophet. But given the fate that awaited the prophets—and Lincoln—most would rather admire than emulate them.

A seldom spoken but ever-present fear among pro-lifers is that a similar analysis applies to abortion and that for us too, a crisis will be necessary for an end to and resolution of abortion. Many pro-lifers are doubly plagued: tormented by the evil of abortion in our midst, but also fearful of the crisis that may be necessary for its resolution. We must begin by asking ourselves

the same questions Lincoln asked. We must know where we are and where we are tending so that we might best judge what to do and how to do it. Are the political circumstances ripe to animate and reap the whirlwind of latent, unresolved abortion guilt? Is the pro-life movement willing to respond to opportunity's call, and provoke a sufficiently intolerable cognitive dissonance to precipitate that crisis which will ultimately bring a resolution?

Much has been written about the flatfooted responses of the Catholic and Protestant churches in the late Sixties and Seventies. It can also be argued that, since then, the pro-life movement has on-again off-again sought redemption on the cheap, trying to bypass the crisis necessary for resolution.

Dr. Bernard Nathanson's film *The Silent Scream* is even now the single most powerful film I have ever seen. It showed a child within the womb in a way few had seen before, and it showed that same child being killed by abortion. And yet, it did not close the deal. The movie had a fundamental flaw: It tried to avert any sense of a personal or collective responsibility for the sin of abortion, by presenting the child within the womb as a victim about whom, until then, we hadn't known, and for whom we were therefore not responsible.

Early in *The Silent Scream*, Nathanson says that when he was in medical school, fetology was not yet a distinct area of study and that it was an article of faith as to whether the fetus was a human being. Later, while describing ultrasound, he continued: "These technologies have convinced us that the unborn child is a person indistinguishable from any other." The unmistakable message of *The Silent Scream* was that we did not know before that abortion killed a baby. With that, there was implicit absolution for all abortions that had been performed up until that point. After all, Nathanson himself had personally aborted thousands of babies, but had only been convinced of the wrongness of abortion after seeing ultrasound images of the child within the womb. If *he* hadn't known, how could *we* have known?

But there was much that was disingenuous about this argument. Pro-lifers had known and presented evidence, from the very beginning, that it was a child. Abortionists were trained physicians, fully knowledgeable about fetal development. The 2,500-year-old Hippocratic Oath explicitly proscribed abortion for the obvious reason that it killed the child in the womb. Further, it was necessary for the abortionist to reassemble the body parts of babies aborted using the dilation-and-curettage method. The general public also knew full well that it was a baby that was killed by abortion. It was obvious and had always been known. The folk description of the state of pregnancy was to be "with child." Everyone had felt or seen a mother's belly move

with the kicking of her unborn baby. Everyone had seen or heard of the advanced development of stillborn babies.

And yet the pro-life movement embraced *The Silent Scream*'s revisionist history of abortion in the hopes of resolution on the cheap. It was the perfect win-win. Abortion had just been the result of a misunderstanding. No guilt for those who had aborted and no resentment towards the accusers.

When *The Silent Scream* first came out I was an undergraduate. Our pro-life group showed the film to a packed room at the university. Through the film, the profile of the issue increased dramatically; but this did not result in a widespread rejection of abortion. It did not provoke a sense of crisis and did not lead to a resolution of the abortion struggle. Ironically, it may have been the film's rhetorical sleight of hand—claiming the baby in the womb was a *newly discovered* victim—that undermined the purgative value of truth.

The ultrasound images of the baby swimming in the amniotic fluid, kicking, moving its head and arms, were transfixing. A hundred and fifty university students were silently captivated as they watched, and then horror-struck when the baby was attacked and torn apart by the abortionist's suction tube. After the meeting a few joined our pro-life group, but only a few, not twenty or even ten. True, to join a pro-life group was a huge step, placing oneself outside of the enlightened self-interest of the promiscuous university. But perhaps part of the reason *The Silent Scream* did not transform large numbers was that Nathanson's self-serving and manipulative ignorance plea was so transparent. Why should they take the leap and change their lives if this Jeremiah was not even willing to name the sin for what it was?

Perhaps he should have identified himself as a murderer, albeit one who murdered within the boundaries of the law. Perhaps he should have sentenced himself to the equivalent of what a just court would apply to such a crime. Perhaps he should have called for the arrest of other doctors who perform abortions. Perhaps he should have called for the arrest of mothers and fathers who abort their babies, and grandparents who help them do so. To pass abortion off as an act of ignorance rather than malice was a gross deception. But it was a deception each of us—Nathanson, the pro-life movement, and the general public—left unnamed and participated in for our own reasons. It sullied and weakened the pro-life movement. We lacked the clear-eyed moral seriousness to earn and deserve victory.

A few years later, Operation Rescue, ironically a mostly evangelical initiative, stepped closer to the very Catholic understanding of the economy of purgation and redemption through a sort of proxy sacrifice. Thousands of pro-lifers were arrested for passive resistance in front of abortion clinics and hundreds spent long stints in jail. Randall Terry, the group's chief organizer,

spoke with refreshing impatience and urgency. He said that if abortion is murder we must act like it. It was the great unspoken truth of the pro-life movement. It had been broadly intuited without being articulated and it carried great resonance. It was not enough merely to say that abortion was wrong. Sin incurred debt which demanded payment.

From the very beginning the pro-life movement had operated within the individualistic-rights framework of liberalism, adopting its ideas and language even to the point of naming itself the "right-to-life movement." The main argument of the pro-life movement had been that in the hierarchy of rights, the baby's right to life was greater than the mother's right to do as she wished with her body, if the mother's actions were to result in the death of the baby. It was a liberal justice argument that depended on the state's correctly identifying and protecting the hierarchy of rights. But, as time passed and the state did not reverse its liberalization of abortion, the inefficacy of appeals to rights moved many pro-lifers to begin to think more in terms of the communalism of the Judeo-Christian tradition. The Old and New Testaments speak repeatedly of nations and peoples. Nations and peoples are blessed and cursed according to their love of God and righteousness. Among the pro-life movement there was a growing sense of our shared, collective responsibility as a nation and a people for abortion. As we moved from calling for the civil rights of the unborn to a communal sharing in responsibility for abortion there was a heightened sense of urgency among pro-lifers.

Rescues received huge media coverage as they provided great street theater. Protestant and Catholic clergy, and mostly the sort of lay people who attend Mass or church services, were carried into paddy wagons. In Toronto, at least, it was surprisingly easy: The police were not brutal and the misdemeanor charges of trespass or failure to obey were usually dropped without court appearances or fines. As well, the psychological payoff was high. Pro-life work had mostly been a rearguard action much like William F. Buckley Jr.'s description of conservatism, standing athwart history yelling "stop." Direct action was pro-active. It emboldened and self-perpetuated. It was a heady experience, much like poking a big sleeping dog with a stick, and though the abortion interest was strong and well-entrenched, they seemed surprisingly disoriented and reactive. We had re-branded ourselves as the disenfranchised outsiders. We had turned the tables on the media and pro-abortion activists who had reflexively identified themselves as the virtuous outsiders fighting the corrupt, oppressive system. Now they were the status quo and we were the advocates of change.

It was also an attitudinal thing. As many commentators have observed, in post-modern culture earnestness had replaced objective truth as the basis for

respectability, and Operation Rescue was nothing if not earnest. But among rescuers on the ground there was a growing consciousness of Rescue as a posture and Rescue as theatre. There was no demanding hierarchy. We were validated by ourselves and one another for having gone above and beyond, just by showing up. For some of us, as we became more circumspect about the meaning of and prospects for Rescue, Randall Terry's dictum "if abortion is murder we must act like it" went from being literal and spiritual to demonstrative and theatrical.

So when the courts began to apply racketeering and organized-crime legislation against pro-lifers, misdemeanors became felonies and the honeymoon was over. In his essay "Why History Matters," Ted Byfield, commenting on Sixties radicalism, makes some broader observations about the limits of grassroots political protests:

> The exhibitionist manifestations of the revolution came to an abrupt end on a fixed date. On May 4, 1970, during a protest rally at Kent State University, the Ohio National Guard opened fire on a student crowd. Four were killed and nine wounded. There was, of course, universal outrage, but it's notable that thereafter protest marches and rallies rapidly declined and soon disappeared. It was no longer fun. It was dangerous.

Byfield continues in a footnote:

> Thomas Carlyle in his history of the French Revolution tells how the Paris mobs, uncontrollable for years, were sharply and permanently subdued by a young French officer who turned the cannon on them and gave them what he called "a whiff of grapeshot." The whole revolution, says Carlyle, was at that instant "blown into space by it, and become a thing that was!" The Kent State incident had the same effect. The young officer`s name was Napoleon Bonaparte.

I would guess that all of us who were in Rescue have felt guilty for having stopped, for not following through. Throughout history men have fought and died for causes less clear, less noble, and yet the most ardent pro-lifers quietly stopped rescuing as soon as there were criminal sanctions. The reason, I think, was lack of authority. One of the conditions of Catholic Just War Theory is that war be waged by a legitimate authority. I have always understood this requirement in terms of the need to replace the orderliness of the regime being displaced, but in light of the failed resolve of Rescue, it's clear that legitimate authority is also necessary to command obedience, perseverance, and sacrifice. Throughout history, most soldiers marched into battle because, once committed, they had no choice. Rescue faded and then collapsed because there was no authority to command participants to carry on when the going got tough, and to punish them if they failed to do so.

Unlike Sixties student protesters who knew they were moving in the same direction as the broad sweep of history and were certain of their vindication,

Rescuers from the beginning knew that the indulgence of the state and the media would not last; they were on borrowed time. Student protesters in the Sixties quit because it had become dangerous and serious, and besides, the fight was largely won before they began. Rescue withered away because our protest had no end game. It seemed morally justifiable to break trespass laws to call attention to the higher moral laws broken by the killing of the innocent preborn; but to continue on an escalating trajectory of disobedience, as the same act went from misdemeanor to felony, was in a way to move from protest to a declaration that the state had lost its legitimacy. This could mean only that one was either an anarchist or a member of the heavenly kingdom. It was the territory of the reckless or the saintly.

The Lambs of Christ, founded by Fr. Norman Weslin—who had retired from the U.S. Army with the rank of Lieutenant Colonel—carried Rescue to its logical conclusion, staging sit-ins where the prosecution was the most aggressive and the penalties the most severe, embracing persecution and imprisonment out of solidarity with the aborted child. Weslin was no wild-eyed anarchist. He described the spiritual posture of The Lambs as "weak, humble, docile, silent, obedient. We pray for those persecuting us." In Toronto, as of this writing, pro-lifer Linda Gibbons sits in jail silent and defenseless, like the unborn child.

The pro-life movement has always been a grassroots movement, and just as the Church is often moved by the *sensus fidelium*, the radicalism that had begun on the streets in front of abortion clinics made its way up to the pages of the leading political/religious journal *First Things*, with the November 1996 Symposium titled "The End of Democracy? The Judicial Usurpation of Politics." The editor's introduction was like a beam of light:

> The question here explored, in full awareness of its far-reaching consequences, is whether we have reached or are reaching the point where conscientious citizens can no longer give moral assent to the existing regime. . . . Some of our authors examine possible responses to laws that cannot be obeyed by conscientious citizens—ranging from non-compliance to resistance to civil disobedience to morally justified revolution.

This was not sophomoric radicalism. The editorial quotes Supreme Court Justice Antonin Scalia: "A Christian should not support a government that suppresses the faith or one that sanctions the taking of innocent life." It continues:

> The Archbishop of Denver [writes] in a pastoral letter on recent court rulings: "The direction of the modern state is against the dignity of the human life. These decisions harbinger a dramatic intensifying of the conflict between the Catholic Church and governing civil authorities." Professor Russell Hittinger observed that the present

> system "has made what used to be the most loyal citizens—religious believers—enemies of the common good whenever their convictions touch upon public things."

Among the five contributors to the symposium was Robert H. Bork, the judge whose nomination to the Supreme Court was thwarted by liberals because he did not pass their pro-*Roe* v. *Wade* litmus test. Bork's rough treatment has become emblematic of the politicization of the Court. Bork described the court as rule by oligarchy. Law professor Russell Hittinger was more careful, more hypothetical, but ultimately even more forceful than Bork. Hittinger wrote:

> The issue of legitimacy can be examined from another point of view. Citizens have a duty not to obey a law if it seriously injures the common good. And were such laws propounded as essential features of the constitutional order itself—which is to say, propounded as laws governing the making of other laws—then we could reasonably ask about the legitimacy of that regime. . . . Issues like abortion, euthanasia, and gay marriage should not be treated as isolated from the broader constitutional crisis. Those who would try to play within the game imposed by the Court, in the hope of incrementally improving the situation issue-by-issue, actually deepen rather than mitigate the authority of the new order. Indeed, it tends to confirm the suspicion that citizens who hold conservative opinions about morals and religion lurch from issue to issue, trying to use the public order merely to win a point, if not to punish those who believe otherwise. Particular issues therefore need to be advanced for the purpose of prompting a constitutional crisis; and prompting the constitutional crisis is the responsible thing to do.

The blowback in the January 1997 issue as well as in other conservative and mainstream media was withering. Midge Decter, Gertrude Himmelfarb, Peter Berger, and others resigned from the editorial board or dissociated themselves from the magazine. They condemned comparisons of America to Nazi Germany as disproportionate, rash, and provocative. They said aloof references to "the current regime" were implicitly disloyal. Midge Decter wrote:

> Could you not see, in the 20th of all centuries, how profoundly offensive it is to speak that way when even the truly morally justified revolutions of our time—against Hitler, Stalin, Mao, and their acolytes and imitators—never, alas, took place? In your Introduction you warn us of the "growing alienation of millions of Americans from a government they do not recognize as theirs." Such a warning smacks of nothing so much as the kind of careless radicalism you and I not all that long ago prayed to have put behind it.

In the Editorial Reply that appeared alongside these criticisms in the January issue, there is regret at friendships lost, there is even a sense of anxiety at this crossing of the Rubicon, but the hand put to the plow remains. "The question of legitimate and illegitimate government, and what it means

for the governance of this country should be a subject of contention. It has been since the founding of this republic, and will be so as long as it endures." The editors emphasize that their purpose is to give voice to what had been and what must once again be: a constant questioning about whether America is remaining true to its founding principles. This vital questioning had fallen silent, but simmered beneath as an unarticulated disquiet. Their purpose was to reinitiate the discussion, to reassert the rights of the people as represented and governed by their elected representatives.

They were aware of the dangers: "Yes there is a danger that the very discussion of these matters could be exploited by the violent who do not share our devotion to the constitutional order and the rule of law." But their protest was rooted in the Judeo-Christian tradition which remains the basis for the views of the person which are the foundation of democracy.

The Judicial Usurpation of Politics Symposium may well have achieved, at least in part, what it set out to do. It pointed out that a great nation, like an individual, can die by the inch or die by the sword. The best part of America, the conscience of America, could die a slow, coward's death, decrying the symptoms but never the sickness, or it could keep faith with the founders and their self-evident truths. Since the thwarted Bork confirmation and the *First Things* Symposium, the idea that the courts, and the Supreme Court in particular, are activist agents of change and subverters of principles and traditions has fully entered the broad political debate. The types of court appointments likely to be made by a presidential candidate figure large in the profile of a candidate. But the Symposium did not galvanize the pro-life effort or elevate it to the necessary level of crisis.

On the cultural front, Women Exploited By Abortion, Project Rachel, and Silent No More have emphasized that abortion is a crime with two victims, both the child and the mother. Mothers who have aborted their babies, and a few fathers, have been speaking up and reaching out to others who have had abortions. But it seems that their stories have more resonance as a caution against abortion among the young than as a call to healing for those who have had abortions. Angelina Steenstra, a representative of Silent No More, recently spoke at Catholic high schools in my area. Many students said that it was the most powerful talk they had ever heard. However, when she gave the talk at a parish hall in the evening, the event—despite its having been advertised as a call to all those silently hurting from an abortion—was attended by only 26 people, most of whom were pro-lifers from the parish.

"We're all hurting, we're all victims" is the pro-life manifestation of the broader cultural phenomenon of identity through victimhood. In *The Minimal Self*, cultural historian Christopher Lasch described how industrial and post-

industrial mass culture has been psychologically overwhelming. Pre-Enlightenment artisan man was created in the image and likeness of God; but this sense of grandeur was diminished by, among other things, Enlightenment specialization and the depersonalization of mass production. The latter is best illustrated by a simple example: In modern industrial culture a chair, of the kind that had once been made by a particular chair maker and was comprehended and mastered as such, was replaced by one of thousands of identical mass-produced chairs. This fact changed our status in relation to things. We were reduced to consumers of copies of types of things, produced in ways beyond our comprehension, in quantities which were daunting and depersonalizing. In response, we retreated from our grandeur as kings created in the image and likeness of God, to become quiet, private men. According to Lasch, this diminishment of the self and retreat into the private ultimately resulted in our political natures' reasserting themselves in a very strange way. We ended up asserting our distinctness through our maladjustment. This caused the rise of "identity through victimhood." Jerry Springer, Oprah, and Dr. Phil trade on people eager to uncover their pathologies as a way of finding or, more precisely, creating their identities.

The philosophy at the heart of Women Exploited By Abortion, Project Rachel, and Silent No More is ultimately as disingenuous as the argument central to the Nathanson films ("The Silent Scream" and also "Eclipse of Reason"). Yes, many women who abort their babies were not supported in their crisis pregnancies or were even pressured to abort. As such they too were victims. But in the hierarchy of goods lost by abortion their suffering does not rank next to the death of the baby. Angelina Steenstra and others like her are not themselves escapists or excuse-makers. Angelina has dedicated her life to reliving her abortion again and again as a purgatory on earth and a cautionary tale. Though she talks about victimhood she lives out the responsibility for her abortion. It is a good and worthy mission at a pastoral level, as a first step; but at a broader cultural level, the victim argument does not provide the indictment necessary to awaken consciences to abortion as a crisis begging for resolution. The mother as co-victim should not be the primary message of the pro-life movement.

The straightforward approach of calling abortion what it is—murder—and calling for prison sentences for all involved clears away conscience-darkening deceptions and creates the crisis necessary for a resolute overcoming of abortion. It also dramatically repositions the abortion debate in politics and the media. To date, the fight against abortion is unique among social causes in that the pro-life movement, out of fear of the crisis necessary for resolution, has consistently understated its case. This has been a tone-deaf

political stance and it has failed. American democratic politics has its own longstanding dialectic, built on bold battle, compromise, and each side settling for half a loaf. Everybody knows this going in, and so it is understood that each side extends its case as far as credibility will endure, knowing that they will not get all they ask for. But amazingly, the pro-life movement has not done this. In fact, the pro-life movement has done the opposite of this, playing down the simple fact that abortion murders a preborn baby.

Over the years most of us have had soft-touch bumper stickers with slogans like "vote pro-life," "I'm pro life," "abortion is mean," "abortion hurts women," and "abortion stops a beating heart." From the beginning of the pro-life cause, pro-lifers—including President Reagan, in his 1983 essay "Abortion and the Conscience of the Nation"—have frequently invoked the weakest, most abstract argument against abortion, namely, the argument that even if we don't know whether there's a living baby in the womb, we should give life the benefit of the doubt. This makes no rhetorical or political sense and actually plays into the hands of our opponents, who have no substantive arguments of their own and remain credible only by raising doubt on pro-life arguments.

The pro-life movement must boldly call abortion murder and call for the imprisonment of abortionists and parents who abort their babies, because this will create a new starting point for the abortion debate in the media and among politicians. It is a starting point that has the ring of truth for individual consciences, and this is a huge step towards overcoming abortion. It moves the pro-life movement from defense to offense, which is exactly where good people should be when bad people have been killing babies and continue to kill babies. The defenders of abortion will be forced to address a new set of arguments. The defenders of abortion will now have to answer the unenviable charge that they are murderers.

This line of argument will no doubt face a media blackout, but when even the president and the Vatican have set up their own YouTube channels this is a receding problem. Through savvy, courage, and persistence the case will be brought to the public, and the media and politicians will have no choice but to catch up. When the reframed abortion debate does emerge center stage, the most immediate effect will be that the pro-abortion camp will suddenly find itself quiet and empty. Who will want to be the public face of the pro-abortion movement, when it is clearly and unambiguously identified as murderous? Up until this point the strongest slogan used by the pro-life movement has been "abortion kills children." When the primary message becomes "abortion is murder" and "abortionists are murderers" and

"supporters of abortion are accessories to murder," being a public spokesperson of the pro-abortion movement goes from no cost to a very high cost.

I would argue that the reluctance—the fear—of the pro-life movement to precipitate a crisis to bring about an end of abortion is understandable. This concern must be especially acute with the election of the most pro-abortion president in history. But the resolution of abortion is not likely to take the bloody trajectory of the resolution of slavery. There are essential differences.

First, slavery was regional—it was concentrated in the South—while abortion is legal and practiced throughout the U.S., Canada, and almost everywhere in the world. Support for and opposition to slavery naturally coalesced around where it was and wasn't allowed, resulting in the Confederacy vs. the Union, the South vs. the North. Though rural areas tend to be more socially conservative than urban centers, and the East Coast and West Coast more liberal than middle America, these divisions are not resounding and definitive.

Second, slavery was a constant, highly visible, and ever-present evil. Abortion is a greater evil, but each abortion is committed as a single act performed behind closed doors. Those who abort their babies hire the abortionist to commit the act, and then get as far away from it as possible both physically and psychologically. Psychologically the act is isolated, compartmentalized, and buried. It is only abortionists who participate in abortion as constantly, as deliberately, and as obviously as the entire culture surrounding slavery was forced to participate in slavery.

Third, the promiscuous culture which both caused and was further fueled by the liberalization of abortion laws is quickly imploding upon itself. Abortion is integrally linked to promiscuity, at the levels of both practice and ideas. In practice, promiscuity among teens has been steadily dropping. This is an astounding fact given the complete debasement of popular entertainment and the ubiquity of pornography. At the level of ideas, promiscuity has lost its cachet of liberation. A huge proportion of teenagers grow up amid the wreckage of their parents' failed serial relationships. They are often denied the innocence of childhood and forced into confidant roles as mixed-up parents gestalt their ways through their tragic mistakes. Promiscuity is just sad and wearying. Without the championing of promiscuity abortion lacks even the basest self-interested justification.

There are intrinsic reasons why the days of abortion will soon end as swiftly and dramatically as did the Berlin Wall. But for all the intrinsic structural decay which set the stage for the collapse of Soviet Communism, the bold leadership of Ronald Reagan, Margaret Thatcher, and Pope John

Paul II was indispensable. Reagan's abandonment of détente in favour of deterrence, and his bold declaration that the Soviet Union was an "Evil Empire"; Thatcher's modernization of the British fleet with nuclear submarines, and the placement of 160 nuclear weapons on British soil; and John Paul II's flesh and blood courage, emboldening Poland's Solidarity movement to rise up from within—all these combined to create a crisis.

In like manner, abortion will end, and it will end sooner and more suddenly than we expect, if we are willing to be bold.

The pro-life movement has been made up almost entirely of church-attending Catholics, Evangelicals, Christian Reformed, Lutherans, Baptists, and other Christians. Pro-lifers have been fueled by their church-fed faith to go forth into the world. Their efforts have not succeeded because they have not been properly ordered. Rather than proceeding *from* the churches, we should direct more of our efforts *toward* the churches—so that the churches wholeheartedly and unqualifiedly lead in challenging the culture on abortion. While pro-lifers are frightened by the Obama presidency and all that it will mean in the U.S. and around the world, Obama's aggressive promotion of abortion may be what is necessary to galvanize the churches and pro-lifers to a new level of sacrifice and commitment.

The central symbol of Christianity is the cross. At its roots Christianity has been unflinching in facing the bloody sacrifice Christ made for us, a sacrifice we are each called to emulate. But in its branches we have become complacent and comfortable. We must reawaken the sense of crisis which must exist within ourselves, as well as between a sinful world and a holy church.

Through a concerted and well-articulated *sensus fidelium*, the pro-life movement must call our churches forward. Our churches must provide the Reagan, Thatcher, and John Paul II who will bring about the end of abortion. But our churches are built from the ground up, we must lift them up and call them forward. In front of our churches and cathedrals we must show our bishops, priests, and pastors the bodies of those who should be sitting in the pews. We must hold up pictures of aborted babies and signs which read: "This is your flock," "Where is our Bishop?" and "Lead us."

If our church leaders join us, if our church leaders make it a duty for all of us, for millions of us, to hold up pictures of aborted babies, if we call abortion murder and those who abort, murderers, there will be a sufficient crisis and abortion will soon end.

Do Pro-lifers Need to Get "Organized"?

John Burger

Barack Obama spent some of his early years as a community organizer in Chicago. In the fall of 2008, there was a general perception that Obama's election as president itself owed much to community organizing. With the alleged voter fraud of ACORN—the Association of Community Organizations for Reform Now—in the news, and pro-lifers wary of the newly elected president, it was perhaps the least likely time for the pro-life movement to embrace the concept of community organizing.

Then again, perhaps it was the *most* likely time.

Two men active in the pro-life movement had pretty much the same thought—independently of each other—at the time of the election: If community organizing can get a young, relatively unknown, relatively inexperienced man elected president of the United States, think what it can do for unborn babies.

"If there's a lesson to be learned from the 2008 election, it is not that the pro-life movement should abandon its efforts to overturn *Roe*," Ruben Obregon, who works full-time for a pro-life organization in the New York area, wrote on *Prolifeblogs.com* in December. "Rather, the lesson is that the pro-life movement, vastly outgunned and outspent, is in dire need of an army of professional community organizers."

Obregon's essay was a call to arms, and marked the founding of a new organization: Organized for Life. The article got mixed reactions, because community organizing has a reputation of being a practice of leftist groups. Saul Alinsky, considered the godfather of modern community organizing, actually dedicated his 1971 book *Rules for Radicals* to Lucifer. And ACORN was considered by those on the right as being practically a branch of the Obama campaign.

Why would the pro-life movement want to associate itself with these types? "People were taken aback," Obregon admits. But Peter Shinn, president of a group called Pro-Life Unity, happened to be thinking the same thing about putting community organizing at the service of life. "When Obama won, I was looking at his community-organizing efforts," Shinn says. "You may not like their politics, but they are kings at outreach. Then Ruben posted an article on the web. I called him up and said, 'We gotta talk.'"

John Burger is news editor of the *National Catholic Register*.

Shinn was "the only pro-life leader to say 'Yes, let's do this," says Obregon.

The two have since parted ways "over some internal issues," Obregon says, though he remains supportive of Shinn and his organization.

New Twist

Pro-Life Unity, which oversees several other efforts—including a monthly telephone "Call for Life" pro-lifers make en masse to elected representatives in Washington to lobby on a particular issue—officially kicked off Organized for Life in September 2009.

Organized for Life is certainly a new twist on spreading the pro-life message. Certain community-organizing techniques, such as petition drives, voter registration, and staged events, have been used before in the pro-life movement, but perhaps not in such an . . . organized sort of way. "The movement has always had the fundamental goal of community organizing," says Chris Slattery, founder of the Expectant Mother Care network of crisis-pregnancy centers in New York City. "In certain parts of the country it's done with public-outreach events—recruiting new people, rallies for life. Door-to-door efforts have been used to rally people for pro-life candidates."

"We learn a lot of our techniques from other social groups," says Joe Scheidler of Chicago's Pro-Life Action League. "For my book, *Closed: 99 Ways to Stop Abortion*, I got some of my ideas from Saul Alinsky. And PLAN, the Pro-life Action Network, for example, at around Christmastime, they'd go out with an empty manger and sing Christmas carols to babies who will never be born. It was very effective and got local news coverage."

Aaron Schutz, chairman of the Department of Education Policy & Communication Studies at the University of Wisconsin-Milwaukee, calls Organized for Life "an interesting development," and says: "I don't know of a precedent of where community organizing has been used overtly by the pro-life movement." But, he adds, "It's always seemed like the pro-life movement has been pretty well organized."

"Yes, the movement is very well organized, but the challenge lies in expanding beyond clinic-based activism and church-based efforts," Obregon responds. "Not that those are unimportant. The challenge lies in reaching outside the existing organizations to those who haven't been reached."

Schutz reports hearing that Alinsky's books are now being bought more by people on the political right than by those on the left. (With regard to the Lucifer dedication, he explained that Alinsky had John Milton's Lucifer in mind, not the Bible's, and that it was consistent with Alinsky's character of trying to shock people out of their complacency.)

Obregon admits it's not the first time some community-organizing

techniques have been employed by the movement. "Door-to-door efforts are not new, but in the past the focus was to garner opposition to specific laws instead of talking about what abortion really is and what it does to a community," he says.

Two Techniques

Obregon, in his *Prolifeblogs.com* article, cited the need to use *paid* community organizers. Volunteers have been the backbone of the pro-life movement, but, because of work and family commitments, they normally cannot devote themselves full-time to the cause. If funding could be found, he wrote, there could be "an army of thousands of paid pro-life witnesses—people whose job, day in and day out, is to spread the Gospel of Life door to door, person to person—without a tie-in to any political party or political philosophy."

For now, though, Pro-Life Unity, with no major foundations or corporations behind it, must rely on volunteers. Shinn says he supports himself and his family from his work as a computer technician and network consultant. Pro-Life Unity, a limited-liability corporation, does fundraising and paid video and website projects for other organizations. "Down the line, we'd like to build a model after how community-organizing organizations are operating," he said. He's not willing to make Organized for Life a 501(c)(3) organization simply to attract tax-deductible contributions: "I want to maintain the ability to oppose or support candidates."

Organized for Life is focusing on two techniques: door-knocking and house parties. Door-knocking has three goals: to learn the feelings of the individual about life issues; to introduce facts to those who are pro-abortion; and to convince those who are pro-life of the importance of their vote. Community organizers—in contrast to other kinds of pro-life activists—would be spending a lot of time talking to people at their doorsteps, Obregon says.

"We talk to fence-sitters, show them pictures of the unborn, the reality of abortion," says Lynda Teutsch of Eugene, Ore., Organized for Life's national director. "We hope to win them over, lead them to say, 'Yeah, this is a life.'"

Door-knockers distribute pro-life literature and DVDs to every house in strategically targeted neighborhoods, and recruit people for other Pro-Life Unity projects, such as Adopt the Mills, which organizes people to pray outside a local abortion clinic constantly during its business hours.

The house parties would be run like Pampered Chef parties, said Teutsch, referring to private parties thrown to demonstrate culinary products for sale. "You invite friends over. It can be planned and worked like a birthday party. You play pro-life DVDs."

Both of these strategies can communicate important information—to dispel myths put out by the "pro-choice" establishment, build political power, and mobilize people on very specific tasks (for example, opposing a new abortion clinic in a neighborhood). "As our numbers grow, we will grow in recognition, and politicians will be aware of the influence we will have on life issues and our government," Shinn says. "Therefore more representatives will change how they vote on these issues."

Shinn says that, over the long term, he'd like to have thousands of people in the field while also organizing church congregations through Cherish Life Ministries—another Pro-Life Unity project—which seeks to get churches to lead people on life issues. Teutsch says OFL wants a group of people in every state, led by a state director with "a group of people under them understanding state laws, understanding that abortion is murder, who know what strengths and weaknesses we have in the state." As of this writing, in November 2009, OFL has people in Oregon, California, Nevada, Arizona, Iowa, Kansas, Virginia, Ohio, Georgia, Florida, Pennsylvania, Virginia, and Vermont. "It's spreading by people getting online like I did, talking to each other, word of mouth, Facebook," she said.

Obregon has since launched a website called Americans Organizing for Life (*www.americansorganizingforlife.com*). He hopes it will serve as a portal of information for groups that want to start community organizing themselves. Ultimately, he says, abortion is a local issue. "There may be a national debate over it, but abortions are happening down the block."

Organized for Life hopes to change that, street by street.

"If it were in this court's power,
I'd sentence you to my dreary life."

Contract and Covenant in American Politics:

Religion in the Abortion & Abolition Debates

William Gouveia, Jr.

> *The introduction of religious passion into politics is the end of honest politics, and the introduction of politics into religion is the prostitution of religion.*
>
> —Lord Chancellor Hailsham

> *A civil ruler dabbling in religion is as reprehensible as a clergyman dabbling in politics. Both render themselves odious as well as ridiculous.*
>
> —James Cardinal Gibbons

While all political leaders endorse what the First Amendment says about religion—"Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof"—there is little agreement on the proper place of religion in our public life. Polarizing this persistent disagreement are two legitimate fears: that of a secularized state independent of all religious values and that of a religiously partial state that threatens civil liberties. These concerns have particular relevance in the abortion debate: Many pro-choicers view the efforts of pro-life religious groups as attempts to garner state support for sectarian religious views and thus violate the Establishment Clause. As the "Freedom of Choice Act" generates renewed fervor on the abortion issue, it is useful to recognize that similar concerns attended the intense and divisive debate over the abolition of slavery.

Both of the controversies turn on the moral question of who is owed equal justice and protection. This fundamental question came to the fore in the two landmark Supreme Court decisions, *Dred Scott* v. *Sandford* and *Roe* v. *Wade*.[1] Both disputes center on differences over value systems, the proper sphere of the judiciary, and constitutional interpretation. And they both demonstrate that religion is inseparably linked to America's political morality.

Defenders of abortion attempt to prohibit religious groups from using their moral beliefs to influence public policy. On this view of religious establishment, religious actors in the political sphere would have to reduce their practices to private exercises—and the result would be to prevent any modern parallel to the slavery debate, in which religious initiatives were instrumental in shaping the public discussion.[2] This essay will examine the abolitionist

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era, in the hope that those involved in the abortion controversy may recognize that all moral questions transcend divisions into the sacred and the secular.

Religion in the Abolition Debate

The growth of the abolitionist movement was largely inspired by religion. As historian Barry Kosmin has observed: "Abolitionist sentiment was deeply religious, imbued with a Puritan concern for the moral behavior of all people throughout America. . . . The abolitionists believed that slavery was a mortal sin with a debilitating effect on the American conscience, and they spoke out with a fervor heard around the world."[3] Evangelical Protestants took up the antislavery cause in both the North and the South early in American history. In 1780, a conference of Methodists denounced slavery as "contrary to the laws of God, man, and nature" and called upon the denomination's regional bodies to seek "the gradual emancipation of slaves." Virginia Baptists followed suit nine years later, calling for the "use of every legal means to extirpate this horrid evil from the land." In 1818, the Presbyterian General Assembly condemned slavery as "a gross violation of the most precious and sacred rights of human nature [and] utterly inconsistent with the laws of God."[4]

With the invention of the cotton gin and the resulting emergence of a slave-dependent Southern economy, the Southern clergy's position on slavery shifted from religiously inspired opposition to religiously based support. "In the 1830s," wrote historian Sydney Ahlstrom, "there was a remarkable change, almost a revolution, in the nation's attitude toward the slavery in its midst."[5] The major denominations—Baptist, Methodist, and Presbyterian—split along regional lines, with abolition continuing to thrive in Northern churches. James Russell Lowell, in his apocalyptic poem "The Present Crisis," directly linked Biblical themes and anti-slavery objectives. The "Battle Hymn of the Republic" gave a religious imperative to the abolition crusade, warning that a day of judgment was near. Abraham Lincoln also couched his abolitionist case in religious terms: "If God now wills the removal of a great wrong . . . impartial history will find therein new cause to attest and revere the justice and goodness of God."[6]

Defenders of slavery objected to the abolition movement on the grounds of its religious character. A petition opposing the Kansas-Nebraska Bill signed by more than 3,000 New England clergymen in 1854 said, "We protest against [slavery] as a great moral wrong . . . exposing us to the righteous judgments of the Almighty."[7] In response, Sen. Stephen Douglas denounced the clergymen, calling them "political preachers" whose exercise of power outside of the spiritual sphere brought "holy religion into disrepute." Douglas, speaking of

the right to own slaves, said, "I am now speaking of rights under the Constitution, and not of moral or religious rights." He ruled out any debate on the morality of slavery, feeling that it was a religious question. In one of his famous 1858 debates with Lincoln, Douglas scorned abolitionists for their view that slavery violated the law of God, and warned: "Better for him to adopt the doctrine of 'judge not lest you be judged.'" Douglas's Senate colleague, James Mason of Virginia, made a similar point: "Ministers of religion are unknown to this government, and God forbid the day should ever come when they shall be known to it." These sentiments echoed the beliefs of many ecclesiastics who held that abolitionist preachers should instead address the welfare of people's souls.

Douglas offered that he did not care whether Americans chose freedom or slavery; all he cared about was the freedom to choose. "I hold that the people of the slaveholding South are civilized men as well as ourselves, that they bear consciences as well as we, and that they are accountable to God and their posterity and not to us. It is for them to decide therefore the moral and religious right of the slavery question for themselves within their own limits." Lincoln's response was that the theme of choice without reference to the object of choice was morally empty. While Douglas ruled the question of a slave's humanity to be out of bounds because of its religious nature, Lincoln continually returned to it with the recognition that, if slaves were human, slavery was tyranny: "When a white man governs himself, that is self-government; but when he governs himself and *another* man, that is *more* than self-government—that is despotism."

The Role of Religion in the Pro-Life Movement

Discussing the abortion controversy, Richard John Neuhaus observed that "not since slavery have such elementary questions been raised about the legitimacy of the controlling ideas by which our society is ordered."[8] Before the 1960s, discussion of the morality of abortion was generally limited to theologians and physicians. State laws banning abortion were rarely challenged. A gradual change in the attitude toward abortion occurred during the 1960s, and, in 1973, the abortion debate became federalized with *Roe*'s establishment of a constitutional right to abortion. Justice Harry Blackmun, writing for the majority, found a basis for abortion's "right to personal privacy" in "the Fourteenth Amendment's concept of personal liberty."

None of the major Protestant churches opposed the *Roe* decision. In 1962, eleven years before *Roe*, the United Presbyterian Church had urged the liberalization of abortion law, a move followed by the Lutheran and Unitarian Universalist churches in 1963. The American and Southern Baptists,

Methodists, and the United Church of Christ initially supported the *Roe* decision.[9] This approval was more than tacit. Dr. Bernard Nathanson, a prominent abortionist turned celebrated pro-lifer, spoke of the clergy's role in supporting his abortion clinic: "It was established and fed by the Clergy Consultation Service, an organization of 1,200 Protestant ministers and Jewish rabbis."[10]

In contrast, many Catholics—clergy and laity alike—reacted with outrage to *Roe* and provided the financial and institutional support to organize the pro-life movement. Before *Roe*, the Catholic hierarchy's approach to pro-life activism was characterized by a comment of Bishop Walter W. Curtis of Connecticut. Even as he sponsored a 1967 pro-life campaign, Curtis asserted that the Church itself would not become involved in political action—because, in his words, "that is essentially the task of our citizens."[11] The impact of *Roe* would change this view, as the bishops realized the seriousness of the attack being waged against the fundamental value of individual human life.

Joining the Catholics, evangelical Protestants became a major component of the pro-life coalition in the late 1970s, using pro-life arguments centered upon traditional values and Biblical morality. Although advocates on both sides of the abortion debate act from diverse motives, the Christian Right and Catholic bishops increasingly made abortion a religious issue.[12] Christian pro-lifers, like the Christian abolitionists before them, feel that their faith's tenet of helping the "least of those among us" offers a moral imperative to fight a battle in which the value of a life supersedes the legal positivism of a court decision. The pro-life crusade, like the abolition movement, is religiously motivated—as historian Milton Sernett has written—"precisely because an entire system of thought and meaning is symbolically being challenged in the secular, pluralistic state."[13] Theologian Ralph B. Potter Jr. echoes the warning: "At stake in the abortion debate is not simply the fate of individual women or even the destiny of individual nations and cultures. . . . [It is] a symbolic threat to the moral order espoused by Christians for two millennia."[14]

Judicial and Electoral Challenges to Religion's Role in the Abortion Debate

The complexity of the role of religion in abortion politics is demonstrated by a string of legal cases responding to the 1976 Hyde Amendment, which bars Medicare payments for elective abortion. Pro-choicers, claiming that the legislation established a religious view of the beginnings of human life, challenged it in 1980 with the *McRae* v. *Matthews* case.[15] Ruling that it did *not* constitute an establishment of religion, federal judge John Dooling wrote: "The healthy working of our political order cannot safely forgo the political

action of the churches, or discourage it."[16] The pro-choicers, led by Secretary of Health and Human Services Patricia Harris, appealed this decision to the Supreme Court in *Harris* v. *McRae*. The plaintiffs, relying upon the "freedom of conscience" and "one cannot legislate morality" arguments, pointed to the heavy involvement in this issue of religious groups—most notably the Catholic Church—and raised the question of whether the state should deny religious groups a policy-advocacy role.

Those sympathetic to the plaintiffs argued that legislation imposing a particular religious position is unconstitutional if it does not reflect a broad social consensus.[17] While there is social consensus on the immorality of, for example, robbery, such agreement is absent on abortion; therefore religious groups should desist from seeking legal enforcement of what amounts to a sectarian doctrine. This logic had previously surfaced in the *Roe* decision, when the Supreme Court absolved itself of deciding when human life begins by referring to the lack of consensus among theologians, philosophers, and the medical community. However, the legitimacy of social consensus as a decider of policy is suspect. For example, at the time of the Fourteenth Amendment, there was no consensus among Americans in either the North or the South regarding the premise that slaves were deserving of equality.

At the Republican National Convention in 1984, President Reagan said: "The truth is, politics and morality are inseparable. . . . Morality's foundation is religion."[18] During the 1984 campaign, pro-choicers emphasized the role of the individual conscience in the decision to have an abortion. Reagan's opponent, Walter Mondale, said that "no President should attempt to transform policy debates into theological disputes"; his running mate, Geraldine Ferraro, stated that she accepted the Catholic Church's teaching on abortion but had no reservations about separating her political views from her "very, very private" beliefs. Sen. Edward Kennedy agreed, arguing that the Catholic clergy had overstepped the proper wall of separation between church and state: "In cases where we are deeply divided . . . the proper role of religion is to appeal to the free conscience of each person, not the coercive rule of secular law."[19]

These issues have continued to resonate in the public discourse surrounding abortion.[20] In the 1989 Supreme Court decision in *Webster* v. *Reproductive Health Services*, Justice John Paul Stevens wrote:

> I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the [Hyde Amendment] preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution. . . . [T]he preamble, an unequivocal endorsement of a religious tenet of some but by no means all

> Christian faiths, serves no identifiable secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause.[21]

Justice Stevens proposed that, unlike religiously derived provisions against murder and stealing, bans on abortion have no secular defense. However, many ethical humanists defend fetal life not for theological reasons but because of moral reasoning based on embryological evidence.[22] There is significant support for the pro-life cause based upon secular reasoning and ethics. Ethicist Kenneth Vaux wrote that we have had "years of widespread public reflection on bioethical issues, not in light of our religious ethos but through sterile qualities of econometrics, utilitarian and pragmatic philosophy, law and sociology."[23]

Seventy-eight pro-life amici briefs were filed in *Webster* to represent thousands of individuals, over 300 organizations, and various coalitions.[24] Although some briefs were from religious organizations, others were from secular groups as diverse as the American Academy of Medical Ethics, Feminists for Life of America, the National Legal Foundation, and the Association for Public Justice. Along with many others, such groups filed briefs based on secular arguments of natural law, embryology, and legal tradition. For example, the American Association for Pro-Life Obstetricians and Gynecologists and the American Association of Pro-Life Pediatricians filed a brief arguing as follows: "Medical Science affirms that life begins at conception. This is the traditional understanding of American medicine since at least the early nineteenth century. . . . Fetology treats the unborn child as a distinct patient."[25]

A coalition of Catholics, Episcopalians, Presbyterians, Baptists, Southern Baptists, Lutherans, Moravians, Methodists, and members of the United Church of Christ filed an amici brief agreeing that, "contrary to *Roe*, history, science, logic, law, and justice all weigh in favor of including unborn children within the protection of the Fourteenth Amendment. . . . Science demonstrates that each individual member of the human race begins life at the moment of fertilization."[26]

The Challenge of Accommodating Religious Actors in Public Policy

The argument against abortion is thus as secular as it is religious. But this does not mean that the religious aspects of the argument can safely be treated as irrelevant. Implicit in the pro-life argument is the belief that abortion is not merely a personal sin but a collective evil—and both are matters of religious import. Claiming that abortion is a sin and that no Christian should have one is, of course, different from asserting that Christians have a responsibility to legislate their view. Mario Cuomo pointed out that Catholic

public officials take an oath to preserve the Constitution and its guarantee of religious liberty, and drew from this fact the following conclusion: "To assure our freedom we must allow others the same freedom, even if occasionally it produces conduct by them that we would hold to be sinful."[27]

But Cuomo's attempt to territorialize religion and politics carries a disturbing echo of the voices heard during the slavery debate. The social-justice activist (and Protestant minister) William Sloane Coffin was right when he declared that—given a belief in the humanity of the fetus—"it's a copout to say that abortion is a sin but not a crime. That's like saying slavery is a sin but not a crime, that I personally wouldn't own slaves but I defend the right of others to choose differently."[28]

Democracy's respect for religious liberty further complicates these issues. Pro-life Christians must confront the fact that other world religions, such as Judaism, reach different conclusions about the morality of abortion. Furthermore, within the framework of Christian moral thinking, many influential Christian groups support abortion and, within the American legal system, it is the moral duty of public officials to uphold the rights of such groups.

The intense debate over partial-birth abortion offers an example of religious support falling on both sides of an issue. The National Council of Catholic Bishops reacted with outrage to President Clinton's veto of the ban on partial-birth abortion, calling it a "shameful veto . . . beyond comprehension for those who hold human life sacred." Approaching the border of direct political involvement, Cardinal Bernardin of Chicago warned that "persons of good will must give serious consideration as they cast their ballots in November."[29] However, nearly 30 Protestant and Jewish leaders sponsored a letter supporting the veto: "We are convinced that each woman who is faced with such difficult moral decisions must be free to decide how to respond, in consultation with her doctor, her family, and God. Neither we as religious leaders, nor the president, nor the Congress—none of us—can discern God's will as well as the woman herself."[30] These pro-choice religious leaders claim that they, too, derive their position from religious principles and their belief in the sacredness of human life.

In America, Politics and Religion Are Inseparable

Reinhold Niebuhr said that "religion is so frequently a source of confusion in political life, and so frequently dangerous to democracy, precisely because it introduces absolutes into the realm of relative values."[31] Indeed, when conflicts such as slavery or abortion take on a dimension wherein compromise is not an option, religious issues challenge the normal system of governance. If one citizen regards abortion as murder and another regards it

as a neutral medical procedure, forging compromise over what constitutes legitimate public policy is extraordinarily difficult.

A desire for pluralism and a rejection of religious intolerance guided the Founders' beliefs about the separation of church and state. Many pro-choice advocates employ this concept in an effort to remove religiously derived pro-life arguments from legislative forums. They point out that the Founders, building on the theological arguments of Roger Williams and the political thought of John Locke, were convinced that government meddling with religion produced intolerance; that's why they crafted the Constitution without mention of God, and thus created a secular state.

But—and this is important—what is unacceptable under the secular Constitution is not the use of religious arguments, but the use of religious certainty to preempt a pluralist democratic process.[32] If policymakers cannot be guided by their religious beliefs, then the freedom of religion is meaningless, because many religions maintain that purely personal faith is incomplete without public interaction. Pro-life advocates defend their right to seek social righteousness through political activity, just as 19th-century churches translated a moral vision into political reality through their advocacy of abolition.

Furthermore, when the issue at hand is whether there is another human being to whom society owes equal rights and legal protection, the problem is not merely a sectarian issue. Such a question, the crux of both the abolition and abortion debates, cannot be neutralized by compartmentalizing the overlapping spheres of public policy, religion, and morality.

Religious Political Actors Must Advance Legislative Goals within a Secular Framework

Whenever religious groups define the terms of abortion policy, pro-choice advocates raise a legitimate concern: that if the matter cannot be addressed in purely secular terms, any resulting legislation is a violation of the Establishment Clause and so, as legal scholar Laurence Tribe argues, the "inescapable involvement of religious groups in the debate over abortion render[s] the subject inappropriate for political resolution and hence proper only for decision by the woman herself."[33]

However, as ethicist Roger L. Shinn has asked, if the government cannot legislate morality, what *can* it legislate, beyond purely administrative matters?[34] When legislation prohibits murder, robbery, fraud, discrimination, and numerous other practices deemed immoral on religious as well as secular grounds, that legislation is seeking justice—which is a *moral* concern. Moreover, religious endorsement of legislation does not disqualify it on First Amendment grounds, because 1) implicitly linking a religious

conviction to a law does not constitute an explicit teaching of religion and 2) the mere coincidence of a law with a religious belief does not make that law an establishment of religion. The Supreme Court's 1965 *Seeger* decision codified this philosophical principle, when it held that there is no clear distinction between a religiously derived ethical position and a secular one.

In issues such as slavery and abortion, there is simply no practical alternative to permitting the influence of religious beliefs on political ideology. Scholar Daniel Callahan has asked: "Why is it that the person who comes out of a religious heritage (e.g., Roman Catholicism) that condemns abortion is said to be acting on 'religious' grounds, while a person from a heritage which does not condemn abortion is not (particularly when the latter tradition has *theological* reasons for not condemning abortion, as with some branches of Judaism and Protestantism)?"[35] The abortion question is largely one of values—specifically, the value of a woman's right to choose to have an abortion versus the value of a fetus's right to life—and such value judgments must have recourse to considerations of which religion is an appropriate and protected determinant. To remove religion from this debate is not only unjust but impossible.[36]

Therefore, the remaining issue is not whether religious organizations are justified in playing a role in politics, but what is the proper extent of their role. The First Amendment was intended by its framers to keep the government explicitly neutral toward religion because, without the disestablishment of religion, debate over the public good would be compromised by the assertion of one religious opinion over all others. Thus, the proper sphere of policy evaluation lies in a public debate that includes all affirmations and denials of religious faiths.[37] Therefore, religiously committed Americans, in advocating their positions on abortion, must subject their views to the test of rational argument and defend them in the public debate if they are to be made into policy.

Consequently, exclusive appeals to religious scripture are invalid as evidence against abortion in a religiously pluralist society. Religious leaders exercising their constitutional right to speak on political matters must be able to persuade public officials on the basis of their position's merits, not on their own religious authority. As the former president of the National Conference of Catholic Bishops, James W. Malone, noted after a presidential election, "In the public arena of a pluralist democracy, religious leaders face the same test of rational argument as any other individuals or institutions. Our impact on the public will be directly proportionate to the persuasiveness of our positions. We seek no special status and we should not be accorded one."[38]

Catholic leaders do not limit their arguments to Catholic doctrine and values but, as stated in a Pastoral Letter of the United States Conference of Catholic Bishops, take a broader view that abortion is "contrary to Judeo-Christian traditions inspired by love for life, and Anglo-Saxon legal traditions protective of life and the person."[39] Because Catholic teaching on abortion (as well as on racism, capital punishment, and just war) derives from natural law,[40] this document goes on to point out that American Catholic bishops are not imposing a theological teaching but appealing to the Western tradition's moral reasoning.

In response to the Catholic claim that its teaching on abortion is universal, author Garry Wills writes, "One does not need a specifically religious motive to conclude that the human fetus has a life that is worth preserving."[41] Theologian Richard McBrien illustrates this:

> There has been a persistent tendency . . . to categorize abortion as a religious issue. Underlying that tendency is an assumption that morality and moral values are inextricably linked with religion and moral values. The argument that morality and religion can be distinct, one from the other, is not a theological argument. It is philosophical, which means that it is not derived from religious conviction. . . . Categorizing abortion as a religious issue serves only those who wish to maximize abortion rights.[42]

Thus the justifiability of abortion is not solely a religious issue, but an ethical one, because it involves the conflict between deeply felt moral values based on considerations of human rights and welfare.

Conclusion

Given the possibility that abortion may well be the taking of a human life, the enlightened conscience of future generations may end up condemning *Roe* v. *Wade* in tones we now reserve for the *Dred Scott* case. William F. Buckley Jr. wrote that abortion "is preeminently the greatest of all issues. Because if it is true—if 100 years from now Americans will look back in horror at our abortion clinics, even as we look back now in horror at the slave markets in Charleston, S.C.—that the fetus is human, then to destroy him as insouciantly as we would, say, squirt a blast of insecticide at a mosquito, or order another drink, is appalling."[43]

In the absence of incontrovertible scientific proof of the kind that would silence activists on both sides and create a consensus, questions remain about who has the power to make decisions about public morality. Religious organizations must continue to recognize that the abortion debate cannot be settled by the mere assertion of theological principles—and everyone else must recognize that people of faith have much more than that to bring to the discussion.

NOTES

1. Milton C. Sernett, "The Rights of Personhood: The Dred Scott Case and the Question of Abortion," *Religion in Life*, Vol. 59, Winter 1980, pp. 461-76.
2. Sernett, "The Efficacy of Religious Participation in the National Debates over Abolition and Abortion," *The Journal of Religion*, Autumn 1984, pp. 205-20.
3. Barry A. Kosmin and Seymour P. Lachman, *One Nation under God: Religion in Contemporary American Society* (New York: Harmony, 1993), p. 37.
4. A. James Reichley, *Religion in American Public Life* (Washington: Brookings, 1985), p. 191.
5. Sydney Ahlstrom, *A Religious History of the American People* (New Haven: Yale, 1972), p. 651.
6. Kosmin and Lachman, p. 39.
7. George McKenna, "On Abortion: A Lincolnian Position," *The Atlantic Monthly*, September 1995, pp. 51-68.
8. Richard John Neuhaus, "Nihilism Without the Abyss," *The Journal of Law and Religion*, Vol. 5, 1987, p. 5.
9. Robert Nelson, "The Divided Mind of Protestant Christians," in Hilgers, Horan, and Mall, *New Perspectives on Human Abortion* (Frederick, Md.: University Publications, 1981), pp. 387-404.
10. Andrew H. Merton, *Enemies of Choice: The Right-to-Life Movement and Its Threat to Abortion* (Boston: Beacon, 1981), p. 52.
11. Ibid., p. 43.
12. Stephen D. Johnson and Joseph P. Lachman, *The Political Role of Religion in the United States* (London: Westview, 1986), p. 166.
13. Sernett, "Rights of Personhood."
14. Ralph B. Potter Jr., "The Abortion Debate," in Donald R. Cutler, ed., *Updating Life and Death* (Boston: Beacon, 1969), p. 101.
15. In establishing guidelines regarding the violation of the Establishment Clause, the Supreme Court included a test of the constitutionality of any law in its 1971 *Lemon* v. *Kurtzman* decision, which prevented public funds from going to private schools. Any law, the ruling wrote, must have a secular purpose, have a primary effect that neither "advances nor inhibits religion," and must not foster an "excessive government entanglement" with religion.
16. Quoted in John T. Noonan Jr., "The Supreme Court and Abortion: Upholding Constitutional Principles," *Hastings Center Report*, Vol. 10, December 1980, p. 15.
17. "Religious Liberty Figures in the Hyde Ruling," *Church and State*, Vol. 57, March 1980, p. 9.
18. All quotes from the 1984 campaign are from Richard P. McBrien, *Caesar's Coin: Religion and Politics in America* (New York: Macmillan, 1987).
19. Quoted in Kenneth D. Wald, *Religion and Politics in the United States* (New York: St. Martin's, 1987), p. 234.
20. This is in part because religious leaders have been actively drawn into the political process by party leaders attempting to build electoral coalitions. Recognizing the tremendous access churches have to voters and their substantial organi-zational capabilities, politicians cannot afford to dismiss religious concerns. Candidates seeking to shift the tenuous partisan alignment appeal to voters on religious grounds through emphasizing relevant issues. Abortion was not ini-tially a partisan issue, yet in the Republican Party's efforts to build an electoral majority, it adopted the pro-life cause and presented itself as the party of religious and moral values.
21. *Webster* v. *Reproductive Health Services* (1989), 492 US 490.
22. Mary C. Segers, "Does the First Amendment Bar the Hyde Amendment?" *Christianity and Crisis*, Vol. 39, March 5, 1979, p. 37.
23. Kenneth Vaux, "Review of *How Brave a New World? Dilemmas in Bioethics*, by Richard A. McCormick," *Christian Century*, Vol. 98, April 8, 1981, p. 393.
24. Susan Behuniak Long, "Friendly Fire: Amici Curiae and *Webster v. Reproductive Health Services*," *Judicature*, Vol. 74, 1991, p.. 261. See also Barbara Kinkson Craig and David M. O'Brien, "The Tide Turns: The Rehnquist Court and *Webster* v. *Reproductive Health Services*," *Abortion and American Politics*, Chap. 6, pp. 197-243.
25. Ibid.26. Ibid.
27. Quoted in Mary C. Segers, "Moral Consistency and Public Policy: Cuomo and Califano on Abortion," in Mary C. Segers, ed., *Church Polity and American Politics: Issues in Contemporary American Catholicism* (New York: Garland, 1990), pp. 157-174.

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29. "Against Infanticide," *National Review*, April 22, 1996, pp. 19-20.
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31. Quoted in Arthur M. Schlesinger Jr., "The Worst Corruption," *Wall Street Journal*, November 24, 1995.
32. Isaac Kramnick and R. Laurence Moore, "In Godless We Trust: Why the Founding Fathers Created a Religion-Free Political Order, and Why We Shouldn't Change It," *Washington Post*, January 14, 1996, pp. C1-C3. Adapted from their book, *The Godless Constitution: The Case Against Religious Correctness* (New York: Norton, 1996).
33. Laurence Tribe. *American Constitutional Law*, 2nd ed. (Mineola, N.Y.: Foundation, 1988), pp. 1349-50.
34. Roger L. Shinn, "Personal Decisions and Social Policies in a Pluralist Society," in Edward Batchelor Jr., ed., *Abortion: The Moral Issues* (New York: Pilgrim, 1982).
35. Daniel Callahan, "Abortion: Some Ethical Issues," in David F. Walbert and J. Douglas Butler, eds., *Abortion, Society, and the Law* (Cleveland: Case Western, 1973), p. 92.
36. Acceptance of the First Amendment religion clauses does not commit one to an accep-tance of religious indifference, because it is not a theological doctrine but an article of civil peace—one to which all can agree for the sake of social stability and harmony. See John Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition* (New York: Sheed and Ward, 1960).
37. Franklin I. Gamwell, "Religion and Reason in American Politics," in Robin W. Lovin, ed., *Religion and American Public Life: Interpretations and Explorations* (New York: Paulist, 1986), pp. 88-112.
38. *New York Times*, November 13, 1984, p. A22.
39. Quoted in Hugh J. Nolan, ed., *Pastoral Letters of the United States Catholic Bishops, Vol. 3* (Washington: United States Catholic Conference, 1984), p. 181.
40. John Connery, *Abortion: The Development of the Roman Catholic Perspective* (Chicago: Loyola, 1977).
41. Garry Wills. *Under God: Religion and American Politics* (New York: Touchstone, 1990), p. 329.
42. McBrien, p. 167.
43. Quoted in Sernett, "Efficacy of Religious Participation," p. 216, n. 41.

"*I'd like to be thought of as leaving the Dark Ages just that much darker for having lived in them.*"

America Deserves Better

Richard Goldkamp

I've spent most of the past two decades working as a copy editor for a thriving suburban daily. That job involves cleaning up mistakes in syntax or grammar, correcting factual errors, clarifying meanings with reporters, writing headlines, and the like. A copy editor truly committed to the job tries to ensure that stories are not only readable but as accurate and impartial as possible, in order to shed light on the truth.

Bias can undermine the effort to provide accurate news coverage. Astute readers know that most newspapers regularly run corrections of factual errors, or clarifications of points in stories, to protect their credibility. Yet how often do you ever see in print, or hear on the nightly news, any correction of "bias" in a story? Bias, you see, is something people in the media prefer to believe we on the news side never indulge in.

A certain degree of bias belongs in journalism—in letters to the editor, op-ed columns, and editorials. But bias has crept into news coverage itself. And, over the past quarter century or so, prestige-media news coverage across the country has gradually tilted toward one side of the issue on one particular subject area: abortion and other matters related to the right to life. Trendy reporting preferences have all too often turned stories on certain issues—euthanasia, assisted suicide, the right to die, embryonic-stem-cell research—into subtle or even blatant denials of the dignity of every human life.

In wading through thousands of wire stories as a copy editor, beginning in the early 1990s, I soon realized that reporting on abortion and other sanctity-of-life issues has become the Achilles' heel of the media elite. From the *New York Times* to the *Los Angeles Times*, from *Newsweek* to *Time* magazine, from CBS to CNN, reporting on the attack on the sanctity of human life sparked by *Roe* v. *Wade* has not only been inadequate at times. It has, at its worst, been overtly disingenuous, in hiding the harsh reality of abortion's impact on both the woman and the child.

In the late 1970s and early 1980s, the editorial-page biases of the prestige media (with some notable exceptions) began to infect their news coverage of the impact of *Roe* v. *Wade* on our country in ways that seriously distorted the truth about human life—or simply began to obscure it from public view. *Roe* came to be regarded as a "landmark" decision—a label that endowed it with a far more positive aura than it really deserved. By way of comparison,

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is there a journalist alive today who would label *Dred Scott* a "landmark" decision on slavery simply because of its impact on American society? Hardly. The label just doesn't fit. *Dred Scott* is now widely held in contempt by observers of key court decisions.

There's unmistakable irony in all this. When the Supreme Court took the nation by surprise in late January 1973 with its rulings on *Roe* and its ugly half-brother, *Doe* v. *Bolton*, most journalists initially did their best to be impartial in reporting on a controversial new national issue. People on one side were widely seen as "anti-abortion" in news coverage. Those who defended the *Roe* decision were normally portrayed as "pro-abortion." It was a reasonably fair and honest way to portray a major new struggle for the soul of America. Abortion, both in word and in fact, held center stage in a major national debate.

But that early impartiality didn't last. Abortion foes soon came up with a stroke of genius to identify what they were *for* as much as "anti-abortionist" showed what they were *against*. The phrase "pro-lifer" spread like wildfire through their own ranks. They saw the new phrase as an accurate portrayal of their commitment to defend an unborn child's right to life. But the media weren't ready to change their approach to this subject—and when they finally did, they almost invariably tilted in one direction.

Even if pro-lifers had no objection at the time to being pictured as anti-abortionists in the news, supporters of *Roe* and *Doe* soon began to worry about their own public image as supporters of an act with a dark side to it that was troublesome to defend at best. The terminology in abortion news coverage slowly began to shift in their direction. *Roe*'s proponents sought new ways to support legal abortion by portraying their foes as out of touch with mainstream America. After most of the media elite had embraced *Roe* as settled law, the elitists subtly began to endorse the right to legal abortion with increasingly euphemistic reporting language. The act came to be portrayed regularly as a way for a woman to "terminate an unwanted pregnancy"—with little concern shown for the life being "terminated." Once the elite embraced the radical-feminist definition of a "woman's right to choose," they no longer saw any reason to question whether *Roe*'s new law of the land had radically undermined a much older and deeper law of nature—the sanctity of human life from conception to natural death—that had once shaped American law.

"Pro-choicers" began turning up more and more in news accounts of this issue. But notice something odd about that: "Pro-lifers" almost never showed up in the news. They were still locked in place by the media as "anti-abortionists."

At one point in the mid-1980s, in fact, *USA Today* carried a feature story with an elaborate, state-by-state breakdown of where the nation's governors

stood on abortion. "Pro-choicers" on one side were lined up against "anti-abortionists" on the other side. Notice how the new *positive* thinkers (the governors who supported a woman's right to terminate the life of an unborn child) were subtly lined up alongside all the naysayers (even though they supported the child's right to live). The net result was to leave readers little doubt about which governors *USA Today* saw as representing the politically correct side of this issue. If "pro-choice governors" represented one side of this thorny issue, why didn't this newspaper list "pro-life governors" on the other side? The paper's editorial slant began to turn up in its reporting as well.

Post-*Roe* media elitists began to generate a host of echo chambers in the mainstream media: Those willing to go with the flow of the *zeitgeist* become downright fashionable. There was another reason for that: The *New York Times*—which modestly claims to carry All the News That's Fit to Print—has long had a special influence on the rest of the nation's press. It sends out daily an advance agenda of its front-page stories as a way to influence news decisions by wire editors elsewhere about stories worth putting into print.

Planned Parenthood, the nation's leading abortion provider, soon became a *Times* icon and slowly built up a receptive audience in the media elsewhere as well—not simply as a leading defender of "a woman's right to choose" but as a women's-health-care provider with a warm and fuzzy image. Readers were apparently expected to view it as a health-care rival to Catholic and other Christian-operated hospitals across the country, even when the latter opposed abortion on moral or religious grounds.

PP's direct connection to abortion should have raised some relevant questions. But why did no one in the major media ever seem interested in asking Planned Parenthood how snuffing out the life of an unborn child was somehow "healthier" for a pregnant woman than bringing that child to term and giving it birth? What evidence did PP have to back up such a bizarre claim?

There's overwhelming evidence that women speaking out in defense of the unborn child were indispensable to the anti-abortion movement. Yet you'd hardly know it from the amount of space the big media devoted to women in leadership roles with groups touting the abortion cause like NOW, NARAL, or Planned Parenthood. Their secular-media visibility was far more pronounced than that of pro-life groups like Concerned Women for America, Women Exploited by Abortion, Silent No More, or Rachel's Vineyard.

At one point, media elitists themselves began to get nervous about the split in jargon between "pro-choicers" and "anti-abortionists" and gradually shifted to the use of a new "abortion-rights" designation to represent *Roe* supporters. *Roe*, after all, made access to abortion a legal right, had it not?

This newest trend in media reporting strategy almost worked. But anyone with a discerning eye could figure out why the new terminology still fell short of real impartiality. Once "abortion rights" hit the news scene, reporting on conflicting views of abortion began to pit abortion-rights proponents against *abortion-rights foes* or *opponents of abortion rights*.

Notice which group remained linked to all the "rights" at stake in this battle (read: the right side of the issue). Or, to rephrase the case with some embarrassing questions elitists refused to ask themselves: Why weren't "right-to-life supporters" allowed to go up against "women's rights supporters"? Or why not require "abortion-rights proponents" hitting the news to fight it out with "right-to-life proponents," or perhaps with "supporters of an unborn baby's right to life," on the other side of this issue?

The silent presence of that unborn child, after all, was at the very heart of this entire debate. Yet once the media elite became so deeply enmeshed in their ideological addiction, they became ever more obsessed with keeping that unborn baby completely out of sight. Think back to how routinely you've seen or heard the unborn child's status in recent years reduced to that of a mere "fetus" in news stories about abortion. That's not the impartial coverage it may sound like. It simply ducks the essential question of the humanity of the unborn child. For much of the media, that child has become something less than fully human. "Fetus" turned it into a kind of scientific curiosity rather than a truly personal presence in our lives.

This denaturing of language has serious consequences for thought. Consider a March 13, 2006 Associated Press story, which reported on a new survey showing that the split among Americans on the abortion issue apparently had changed little over the years: Most Americans tended to view *Roe* v. *Wade* as a decision that should continue to be upheld by the courts, but they also saw a need for more limitations on when abortion should be allowed. The following amazing passage is from the story's third paragraph: "Most think that having an abortion should be a personal choice. But they also think that it is murder."

Stop for a moment and savor that: A form of *murder* is supported by *most* Americans as a *personal choice*?

That violent contradiction between the legal and moral values at stake here should speak for itself. But for a good many Americans, apparently, it did not. In reducing abortion from a homicidal act to a mere "personal choice," Supreme Court Justice Harry Blackmun's majority opinion in *Roe* v. *Wade* had touched off a deep and paralyzing state of tension in American culture.

One of the hidden factors that led to the flagrant contradiction in values on display in that AP story was the lack of any graphic illustration—in the

mainstream media—of what actually takes place when an unborn child is aborted. The evidence existed: Some gutsy activists decided that the best way to make their case might be to take pictures of those broken, mangled little bodies and present them to local media outlets. Almost invariably, nothing happened. Editors in newsrooms across America apparently thought they might be perceived as exercising poor taste in news judgment by allowing such photos to hit print; or perhaps they simply feared being accused of "taking sides" in a contentious national debate.

Neither motive was a particularly worthy excuse for inaction. One of the mass media's long-standing hallmarks, in fact, has been to leave no stone unturned in their efforts to right some personal or social wrong in our midst. Abortion did not qualify either way, it appears.

It was almost as if there were an unofficial agreement to censor any pictorial display of aborted babies, without any actual conspiratorial meeting to authorize the censorship. The new ideology on "abortion rights" had become the politically correct view in much of the media.

To coin a relevant analogy, how long might people in Western countries have remained blind to what happened to Jews and other victims of Nazi atrocities during the Holocaust, if Jewish activists had not gathered photos of those emaciated bodies at mass grave sites after World War II, then circulated them for media audiences to see?

I'm not yet ready to join those who think the nation's liberal media elite is in the process of total self-destruction. But I'm among those pro-lifers who hope our elitist media friends eventually come to recognize the error of their ways, and see why their condescending attitude toward the sanctity of unborn life clashes so violently with the truth. You don't have to be Catholic to recognize the import of what Pope John Paul II once called the "divine spark within." I think that phrase can be interpreted not only as the voice of conscience, but as a power living in all of us, regardless of religious persuasion, to rely on our faith in human reason—to coin a paradox—to grasp the meaning of natural law.

Consider the kind of spark it took, for instance, to inspire America's Founding Fathers to draw up our Declaration of Independence and the "self-evident truth" that all men are created equal, endowed by their Creator with "unalienable Rights" to "Life, Liberty and the pursuit of Happiness." Is there a clearer way to interpret that passage than as a defense of human life itself, grounded in natural law; or alternatively, how easily the right to life can be interpreted as an indispensable part of that law? If our Founders viewed natural law as the proper foundation for the birth of their new nation and the rights

of its citizens, then it can also be argued they set the stage for pro-lifers today to view that law as a strong basis for every unborn child's right to life.

I cannot lay claim to any special insight into how God tends to act for our benefit at critical moments in our lives. Yet as a practicing Catholic, I share with countless fellow Catholics and other Christians a widespread belief that God has the power to draw good out of grave evil—oftentimes when we are in dire need of it. Take a look at the sagging economy that has preoccupied our country in recent months. We can all agree that money is a necessary ingredient in our lives, a good thing in that sense. But greed is not.

Now consider the enormous attention we devoted, via the media, to our nation's recent widespread preoccupation with the pursuit of wealth, and its grossly uneven distribution in our country. Then recall the public anger that arose over how much wealth had gone to select people in corporate America's executive suites and, yes, into the hands of well-heeled congressmen as well. Some of those same congressmen feigned outrage over executive bonuses despite the fact that their own coffers had been handsomely larded with funds from wealthy bankers and other corporate donors looking for favorable treatment in Congress—while our national economy continued to flounder.

The foul odor of evil was clearly in the air. But we should be ready to admit that the evil at work did not lie solely in the hallways of Congress or corporate executive suites. It was tied to the mad pursuit of the dollar for its own sake—through such things as the reckless use of credit cards and the pursuit of homes by people who couldn't afford them—the kind of things, in other words, that tempt all of us at times. But think about it: Was there already a "divine spark" at work in all of us to help us cope with our economic dilemmas? The best approach to finding our way out of any adversity may be to rely first of all on the inherent dignity and worth of America's family life. Every man and woman who has come to love life by starting a family finds that the greatest riches do not lie in creating a hefty bank account or a vast stock portfolio, or even in achieving a great deal of their political influence. Our greatest treasure—and America's—lies in our own children.

Anyone familiar with the work of America's Founding Fathers knows they felt strongly that the survival of their new republic depended on a well-informed population with a respect for the truths on which it was based. We can only hope that our nation's courts, along with the White House and Congress, are still willing to rediscover the Founders' wisdom, and to rebuff the newest attacks on the American family. Aided and abetted by serious distortions of human nature created by the sexual revolution, our homegrown culture of death has helped to undermine family life badly in our country today. America deserves better than that.

Cellulose Persons and Other Straw Men

Gregory J. Roden

You might be surprised to learn that the right to abortion also serves to secure our First Amendment right to free speech, at least in the view of one writer, Professor Ronald Dworkin. As the professor spins it, "If a *state* could declare trees to be persons with a constitutional right to life, it could prohibit publishing newspapers or books in spite of the First Amendment's guarantee of free speech, which could not be understood as a license to kill."[1] You see, if the states had the *power* to declare fetuses "persons," then there would be no stopping the states from impairing our constitutional rights "by adding new persons to the constitutional population"—trees, for example; cellulose persons. Having propped up this straw man, Dworkin then knocks it down, "Once we understand that the suggestion we are considering has that implication, we must reject it. If a fetus is not part of the constitutional population under the national constitutional arrangement, then *states* have *no power* to overrule that national arrangement by themselves declaring that fetuses have rights competitive with the constitutional rights of pregnant women."[2]

Justice John Paul Stevens found Dworkin's arguments to his advantage in his separate opinion in *Planned Parenthood* v. *Casey*; he quoted the above to support his affirmation of the *Roe* v. *Wade* opinion. Stevens restated Justice Harry Blackmun's claim in *Roe* that unborn children were not persons "within the language and meaning of the Fourteenth Amendment." Stevens repeated Blackmun's allegation that unborn children had only "*contingent* property interests." And he also reasserted Blackmun's further declaration that "the unborn have never been recognized in the law as persons in the *whole* sense." Stevens ended with the clincher, "no Member of the Court has ever questioned this fundamental proposition."[3] This latter claim has even been reiterated by some who are otherwise pro-life to dissuade other pro-lifers from pressing for personhood. Yet, these assertions are wrong in fact and theory.

Let's start with the "cellulose person" argument. We need first consider the origin of federal power. In its early decisions, when the Court was not so far removed in time from our nation's founding, it was common knowledge that the federal Constitution was derived from the sovereign states,[4] who in turn received their power of government from the people.[5] Our federal

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government is one of limited, enumerated powers—powers granted to it from these states.[6] Logically then, the federal government could receive from the states only the powers the states had to give.

Herein lies an inherent contradiction with the cellulose-person argument: If the federal government has a power, then the states must likewise have the same power currently, or have held said power at one time.[7] So, to argue that the federal government has the power to decide who is or is not a person is to argue that the states hold the same power, or at least held it at one time. The analysis then becomes an inquiry into whether the states have granted all, part, or none of their power in this particular area to the federal government. Where then in the Constitution do the states grant the federal government the power to declare who is or who is not a person? The answer is nowhere—not even in part. Consequently, this power is still retained by the states under the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Looking at it from another perspective, the rights of life, liberty, and property are natural rights which pre-existed our state and federal governments, as affirmed in the Declaration of Independence. It is the states, not the federal government, that have the primary duty to protect those unalienable rights. As the Court stated in *U.S.* v. *Cruikshank*:

> The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the States, when they entered into the Union under the Constitution, was to protect *all persons within their boundaries* in the enjoyment of these "unalienable rights with which they were endowed by their Creator." Sovereignty, for this purpose, *rests alone with the States*.[8]

Consequently, we ought to look to the states to see if they held unborn children to be persons with justiciable rights.

The method of looking to the states to see if they concede legal rights to the unborn as persons was an approach used by Blackmun in *Roe*.[9] Blackmun noted that the unborn had legal rights under criminal, tort, wrongful-death, and property law, although—in examining these areas of the law—Blackmun disingenuously denigrated the status of the unborn under them. This deception allowed Blackmun to conclude that unborn children were not "persons in the whole sense." However, the articles and cases Blackmun cited do not support his conclusion. Quite to the contrary, the articles and cases actually show how unborn children were treated as persons under criminal,[10] tort,[11] wrongful-death,[12] and property law[13] at the time *Roe* was decided. Ergo, the

Roe holding that unborn children were not persons is a false conclusion born of false premises.

So much for the *factual* inaccuracy of Blackmun's argument. Let's turn to the *logical method* he employed. The logical form of Blackmun's argument can be illustrated by the following:

> **Minor Premise**: Unborn children are not persons under state criminal, tort, wrongful-death, and property law.
> **Conclusion**: Unborn children are not persons.

In logic, this is known as an enthymeme; it is missing the Major Premise—an axiom that is accepted as true and is the basis for the argument. An enthymeme assumes the Major Premise is obvious and so the reader can provide it. In this instance, the Major Premise ought to read something like this: "State treatment of the legal rights of unborn children is determinative of their personhood." Without such a Major Premise, Blackmun's argument would be as faulty in logical *theory* as its Minor Premise and Conclusion are faulty in *fact*.

The state laws regarding criminal, tort, wrongful-death, and property law have been referred to as "municipal law" by the Supreme Court. The state municipal law concerns the rights of life, liberty, and property, which, as the Court has said, "include all civil rights that men have."[14] The states have always had the power to enact municipal law and kept that power after the enactment of the Fourteenth Amendment. As the Court stated in the Civil *Rights Cases* (1883):

> [The Fourteenth Amendment] does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment.[15]

As opposed to the broad swath of state municipal law concerning the rights of state citizenship, the federal rights and privileges of national citizenship are rather limited. The Court has listed some of these rights in the past: "the right to pass freely from state to state; the right to petition Congress for a redress of grievances; the right to vote for national officers; the right to enter the public lands; the right to be protected against violence while in the lawful custody of a United States marshal; and the right to inform the United States authorities of violation of its laws."[16] As none of these rights ordinarily pertain to the circumstances of unborn children, we should not expect any federal case law holding unborn children to possess these national rights and privileges.

So when Blackmun made a superficial examination of the Constitution in *Roe* and held "the use of the word [person] is such that it has application only postnatally,"[17] this was a red herring, given the limited scope of substantive rights of national citizenship. Blackmun does not even get any points for originality; he borrowed this argument from the general counsel for NARAL, Cyril C. Means Jr.[18] Of course, Blackmun omitted the Preamble to the Constitution from his analysis, which clearly proclaims that the purpose of the Constitution is also to protect the interests of those who are not yet born:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and *our Posterity*, do ordain and establish this Constitution for the United States of America.

With all of this in mind, let us review Section 1 of the Fourteenth Amendment. The second sentence of it reads:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourteenth Amendment concerns the municipal law of the states, and it operates only as a "redress against the operation of state laws . . . when these are subversive of the fundamental rights specified in the amendment."[19] So when Blackmun stated in *Roe* that the test of personhood was whether "the fetus is a 'person' within the language and meaning of the Fourteenth Amendment," logically the phrase "language and meaning of the Fourteenth Amendment" refers to the body of state municipal law, the very subject of the amendment.

It is of no small importance that the text of the Equal Protection Clause refers to "*any* person within *its* jurisdiction"; "its" referring to the state. The Supreme Court has consistently held that "the Fourteenth Amendment was designed to afford its protection to *all* within the boundaries of a State,"[20] as the Court confirmed in *Plyler* v. *Doe*. This is true of both equal protection and due process. Furthermore, states are prohibited by the Court from using the phrase "within its jurisdiction" to exclude any "subclasses of persons" from the protective umbrella of the Fourteenth Amendment.[21] Any truthful examination of state municipal law shows unborn children to be persons within their jurisdiction. Yet, Blackmun summarized his disingenuous examination of personhood under municipal law with this: "In short, the unborn have never been recognized in the law as persons in the whole sense."[22]

The phrase "persons in the whole sense" was never used by the Court before *Roe*.[23] Blackmun did not offer an explanation for the term nor did he provide any citations to support the use of the phrase.[24] It can only mean he created a subclass of persons to which the Fourteenth Amendment does not apply. By doing so, he "undermined the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment."[25]

Instead of an honest inquiry into personhood under state municipal law, Blackmun utilized a logical fallacy to redirect the investigation: "The appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment."[26] Blackmun was referring to the fact that during the second oral-argument hearing, when asked, the assistant attorney general for the state of Texas, Robert C. Flowers, could not cite such a case. Here Blackmun employed the logical fallacy, *argumentum ad ignorantiam*. The logic fails because the premise that Mr. Flowers could not cite such a case regarding personhood (under the time pressure of oral argument), does not mean there are no such cases. In fact, there are many.

Surely the test for being a "person within the meaning of the Fourteenth Amendment" is not the existence of a prior Supreme Court case explicitly stating so. Such a circular argument is the logical equivalent of a dog chasing its tail. As the Fourteenth Amendment has no definition of who is a person, every Supreme Court decision dealing with a particular class of persons for the first time, and holding them to be within the scope of the Fourteenth Amendment, necessarily reaches beyond this circular logic. That is to say, the Court has never been hindered from holding that certain classes of people are persons under the Fourteenth just because they had not been previously held to be so. In *Yick Wo* v. *Hopkins* (1885)[27] the Court held that aliens, although neither "born or naturalized" citizens, were nevertheless persons under the Fourteenth Amendment; and in *Plyler* v. *Doe* (1982)[28] the Court held illegal aliens to likewise be so protected.

As the Court stated in *Holden* v. *Hardy*, "It is sufficient to say that there are certain immutable principles of justice, which inhere in the very idea of free government, which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice, and an opportunity of being heard in his defense."[29] Thus, there was no case in the history of the United States that allowed for the deprivation of *life* of a "natural person,"[30] a human being, without due process, or denied equal protection of the right to *life*, on the basis that he was not "a person within the meaning of the Fourteenth Amendment"—at least until *Roe* v. *Wade*.

Accordingly, we look to see if unborn children were held to be *natural* persons under the municipal law of the states.

All one need do to discover an enormous wealth of case law holding unborn children to be natural persons is to read the cases and articles Blackmun cited supposedly to support his opinion in *Roe*. Let's look at a case from Mr. Flowers's home state of Texas. The first Texas case is *Nelson* v. *Galveston, H. & S. A. Ry. Co*.,[31] an action by a posthumous child seeking recovery for his father's death under a wrongful-death statute. Gustave Nelson was born five-and-a-half months after his father's death and his mother, as his next friend, brought suit on his behalf under the statute. The defendant claimed "that at the time of the death of the plaintiff's father, on the 25th April, 1882, the plaintiff was not in being, was unborn and unknown, and an unheard-of quantity, having no legal existence, and no right of action for the injuries complained of."[32] The court rejected this argument, recounting "Lord Hardwicke, discussing the same question [in *Wallis* v. *Hodson* (1740)], held that a child in the mother's womb is a person *in rerum natura*, and that by the rules of the civil and common law 'she [the child] was, to all intents and purposes, a child, as if born in her father's life-time.'"[33]

The Supreme Court of Texas then made note of the "many old English cases" that held unborn children were understood to be included in the term "children born" under probate and property law. Using these principles, the court reasoned:

> Had the expression "surviving children" been used in a will in the same connection as in the statute, and had it been for the benefit of the posthumous child to take, under the authorities cited it would be held to apply to him. . . . We conclude, therefore, that it was manifestly the purpose of the legislature to give the right of action, in a case like the present, to all of the surviving children of the deceased. We think, also, that the plaintiff in this case, although unborn at the time of his father's death, was *in being*, and one of his surviving children.[34]

Nelson v. *Galveston* employed two phrases to denote the unborn child as a natural person: that the child was "in being," and "a person *in rerum natura*."[35] Black's Law Dictionary defines *in rerum natura* as "In the nature of things; in the realm of actuality; in existence."[36] As the Supreme Court of Massachusetts stated in *Hall* v. *Hancock*, "Lord *Hardwicke* says, in *Wallis v. Hodson* . . . that a child *en ventre sa mere* is a person *in rerum natura*, so that, both by the rules of the civil and common law, he is to all intents and purposes a child, as much as if born in his father's lifetime."[37]

The common law, of England and as adapted by the states, has always held unborn children to be natural persons for the purposes of property law, using the phrases "in being" or "in esse." An example of this is the Rule

Against Perpetuities, which disallows transfers of property that do not vest within the life of a natural person "in being," plus 21 years afterwards. With regards to family transfers, the Rule essentially allows transfers to children and to grandchildren, as grandchildren are necessarily conceived within the life of the child of the person making the transfer. Accordingly, the Rule recognizes children in the womb, "*en ventre sa mere*," as natural persons. The U.S. Supreme Court recited the Rule approvingly in *McArthur* v. *Scott* (1884):

> To come within the rule of the common law against perpetuities, the estate, legal or equitable, granted or devised, must be one which, according to the terms of the grant or devise, is to vest upon the happening of a contingency which may by possibility not take place within a life or lives in being (treating *a child in its mother's womb* as *in being*) and twenty-one years afterwards.[38]

One article Blackmun referred to in *Roe* makes this bold declaration: "The state of the law in American courts is fairly well summed up in *In re Holthausen's Will*, where a New York court states that: 'It has been the uniform and unvarying decision of all common law courts in respect of estate matters for at least the past two hundred years that a child *en ventre sa mere* is "born" and "alive" for all purposes for his benefit.'"[39] The common-law Latin phrase for this concept is *posthumus pro nato habetur*, meaning, "A posthumous child is regarded as born-before the death the father."[40] Again from *Hall* v. *Hancock*:

> [A] child is to be considered *in esse* at a period commencing nine months previously to its birth, and where there is not evidence to rebut the presumption, it is conclusive. We are also of the opinion, that the distinction between a woman being pregnant, and being quick with child, is applicable mainly if not exclusively to criminal cases; and that it does not apply to cases of descents, devises and other gifts; and that, generally, a child will be considered in being, from conception to the time of its birth, in all cases where it will be for the benefit of such child to be so considered.[41]

Yet this last quote raises a key question: What about the quickening standard and the criminal law? Let's look at another Texas case, this one cited directly by Blackmun in *Roe*: *Gray* v. *State*. This case involved the review of M. E. Gray's indictment under a Texas statute for producing the abortion of a child. The indictment was tested to see if it complied with state statutes, and the court examined the common law before doing so (and affirming the conviction):

> A careful review of the authorities indicates that at [English] common law abortion could not be produced upon a woman, unless and until the child was "quick" within her womb. The courts of our various States differ as to this, most of them holding that an abortion can be produced at any time after conception and before the woman was "quick" with child.[42]

First, let's not allow one subtlety escape our eye. Note how the word "abortion" is used. It is used as a name for a crime, as one would use murder, rape, assault, robbery, etc. This was a common use of "abortion," even the Supreme Court utilized the word "abortion" in this fashion.[43]

Second, we see that it was alleged that, under English common law, terminating a pregnancy was not criminal prior to quickening (cases such as *Rex* v. *Eleanor Beare*,[44] holding abortion to be criminal prior to quickening, notwithstanding). But, after quickening—after the unborn child starts to move—it was criminal under the English common law.

Third, the Court of Criminal Appeals of Texas asserts that most of the state courts did not follow the quickening rule and held abortion to be criminal "at any time after conception." Even Blackmun's *Roe* opinion notes two state cases that held abortion to be criminal post-conception rather than post-quickening.[45] Obviously, the states were free to change the English common law as they saw fit. After all, the states won the War of Independence and earned their sovereignty on the battlefield.[46] So too, the states were free to replace the common law in part or completely, and most of them did so with regard to abortion, holding it to be criminal at any time after conception, as Blackmun noted in footnote 2 of *Roe*.

Yet, as the states have sole jurisdiction over the criminal law,[47] how did Blackmun justify overturning these laws in *Roe*? Blackmun imposed a contrived understanding of the English common law upon the states. Blackmun posited a theory under which abortion, even after quickening, was not criminal under the English common law. Blackmun derived this theory from the alleged scholarship of NARAL's counsel, Cyril Means, and NARAL's founder, Lawrence Lader. Blackmun then fixed his theory of the English common law upon the states, even though all the state case law he cited held abortion to be criminal at least after quickening.[48] As Blackmun announced in *Roe*: "In this country, the law in effect in all but a few States until mid-19th century was the pre-existing English common law."[49] Blackmun concluded, "It now appear[s] doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus."[50]

This is perhaps the most radical constitutional deviation contained in *Roe*. As the Court had always maintained, "No one will contend, that the common law, as it existed in England, has ever been in force in all its provisions, in any state in this union. It was adopted, so far only as its principles were suited to the condition of the colonies."[51] And, as the states are free to change or reject the common law,[52] the Supreme Court defers to the states for its interpretation of their law. The Supreme Court has always rejected the idea

that the English common law was to be fixed upon the states like a "straight jacket."[53] One year before the *Roe* opinion, the Court reaffirmed this rule, "This construction of state law is, of course, binding on us."[54] As the states have sole jurisdiction over their municipal law, and they were and are free to adopt, interpret, amend, or dismiss the English common law, the *Roe* v. *Wade* opinion is more than just a study in logical fallacies, it *is* a logical fallacy.

In deference to state municipal law, the Supreme Court upheld the rights of unborn children in two cases prior to *Roe*. In *McArthur* v. *Scott*, the Court upheld the property rights of unborn persons acquired by inheritance under Ohio law.[55] And, in *Weber* v. *Aetna Casualty & Surety Co*., the Court upheld an unborn person's rights to Louisiana workmen's compensation benefits accruing at the death of his father in a Fourteenth Amendment Equal Protection case.[56] Likewise, the federal courts have routinely upheld the rights of unborn persons to Social Security Child's Survivor Insurance benefits. In another case from the state of Texas, *Wagner* v. *Finch*, the Fifth Circuit Court of Appeals reversed a Northern District Court of Texas decision that a posthumous illegitimate child, conceived shortly before her father's death, was not the "child" of the "insured individual as that term is defined by the Social Security Act." In its reversal, the Court of Appeals declared, "We agree that the illegitimate child of a deceased father, conceived before, but born after, the father's death, is sufficiently 'in being' to be capable of 'living with' the father at the time of his death."[57]

Moreover, there are some limited jurisdictional instances wherein the federal government has the ability to enact municipal laws, such as in the District of Columbia. Here too the federal law has mirrored state law in recognizing the rights of unborn children as persons. The federal courts have held unborn children to be persons for recovery due to prenatal torts in the District of Columbia,[58] under the District of Columbia's wrongful-death statute,[59] and for prenatal injuries under the Federal Torts Claims Act.[60]

In all of these Supreme Court and federal cases, the courts have fulfilled their duty to protect the vested rights of unborn persons. As Chief Justice John Marshall stated in *Marbury* v. *Madison*: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[61] On the other hand, where a court fails to grant the fundamental right of representation to any party whose rights are being decided upon, that case is void for lack of due process. The applicable Latin maxim is *coram non judice*, and this was the basis for

the Court's decision in *McArthur* v. *Scott*.[62] Since the Court denied a motion for a guardian ad litem to join in the arguments in *Roe*,[63] so too should *Roe* v. *Wade* be considered null and void by this rule of law per *McArthur* v. *Scott*.

It is more than ironic that some pro-life advocates are dismissive of unborn children's personhood because the state original jurisdiction over municipal law prevents the federal government from being able to enact municipal law for the states.[64] Adding to the irony, the idea that state municipal law is irrelevant to understanding the term "person" was originally proposed by the general counsel for NARAL, Cyril Means: "Whatever one or more of the several states of the United States may choose to do, either with their legal rules or with their legal nomenclature, is of no federal constitutional significance."[65] This is an especially incongruous argument when it is remembered that the very subject matter of the Fourteenth Amendment is the municipal law of the states.

The object of the Fourteenth Amendment is to give the federal government the ability to regulate state municipal law when that municipal law becomes "subversive of the fundamental rights specified in the amendment."[66] Consequently, the phrase "within the language and meaning of the Fourteenth Amendment" must necessarily pertain to the municipal law of the states. This being understood, the historical fact that the states treated unborn children as persons under their municipal law is of great "federal constitutional significance," despite the protestations of NARAL. There can be no other valid conclusion than that a "fetus is a 'person' within the language and meaning of the Fourteenth Amendment."

NOTES

1. Ronald Dworkin, "Unenumerated Rights: Whether and How *Roe* Should be Overruled," 59 *U.Chi.L.Rev*. 381, 401 (1992) (emphasis added).
2. *Ibid*. (emphasis added).
3. *Planned Parenthood* v. *Casey*, 505 U.S. 833, 913-14 (1992).
4. *Federalist*, No. 32:
   An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a *partial* union or consolidation, the State governments would clearly *retain all the rights of sovereignty* which they before had, and which were *not*, by that act, exclusively *delegated* to the United States (emphasis added).
5. *E.g. Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1885) ("Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.").
6. *United States* v. *Morrison*, 529 U.S. 598 (2000); United States v. Lopez, *514 U.S. 549 (1995)*; *Gregory* v. *Ashcroft*, 501U.S. 452, 457-458 (1991); *Cooley* v. *Board of Wardens of Port of Philadelphia*, 53 U.S. 299, 320 (1851), Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.").

7. *Ware* v. *Hylton*, 3 U.S. 199, 231 (1796) (Chase, J., seriatim) ("The proof of the allegation that Virginia had transferred this authority to Congress, lies on those who make it; because if she had parted with such power it must be conceded, that she once rightfully possessed it."); *Cooley* v. *Board of Wardens of Port of Philadelphia*, 53 U.S. 299, 320 (1851) (Curtis, J.) ("It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the states of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several states.").
8. *U.S.* v. *Cruikshank*, 92 U.S. 542, 553 (1875) (emphasis added).
9. *Roe* v. *Wade*, 410 U.S. 113, 161 (1973).
10. Gregory J. Roden, "*Roe* Revisited: A Grim Fairy Tale," 30 *Human Life Review*, no. 2, 49 (Spring 2004) (hereinafter "*Roe* Revisited"); Roden, "*Roe* v. *Wade* and the Common Law: Denying the Blessings of Liberty to our Posterity," 35 *UWLA Law Review* 212 (2003).
11. "*Roe* Revisited"; Roden, "Prenatal Tort Law and the Personhood of the Unborn Child: A Separate Legal Existence," 16 *St. Thomas L. Rev*. 207 (2003).
12. *Ibid*.
13. Roden, "Unborn Children as Constitutional Persons," 25 Issues in Law & Medicine ____ (forthcoming 2010), Gregory J. Roden, "Unborn Persons, Incrementalism, & the Silence of the Lambs," 33 *Human Life Review*, no. 4, 22 (Fall 2007).
14. *Civil Rights Cases*, 109 U.S. 3, 13 (1883)
15. *Ibid*. at 11. Likewise the Court wrote in *Terrace* v. *Thompson*, 263 U.S. 197, 216-17 (1923):
    The Fourteenth Amendment . . . does not take away from the state those powers of police that were reserved at the time of the adoption of the Constitution. And in the exercise of such powers the state has wide discretion in determining its own public policy and what measures are necessary for its own protection and properly to promote the safety, peace and good order of its people.
16. *Twining* v. *State of New Jersey*, 211 U.S. 78, 97 (1908).
17. 410 U.S. at 157.
18. *See* Means, "The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?," 17 *N.Y.L.F*. 335, 401-410 (1971) [hereinafter "*The Phoenix*"].
19. *Civil Rights Cases*, 109 U.S. 3, 11 (1883).
20. *Plyler* v. *Doe*, 457 U.S. 202, 212 (1982) (emphasis added).
21. *Ibid*. at 213.
22. 410 U.S. at 162.
23. From a case cited elsewhere by Blackmun, in which the Court of Appeals of New York stated: "But unborn children have never been recognized as persons in the law in the whole sense." *Byrn* v. *New York City Health & Hospitals Corp*., 31 N. Y. 2d 194, 286 N. E. 2d 887 (1972). The only citation the Court of Appeals used to justify this conclusion was an article by NARAL's counsel, Cyril Means. Means, "The Phoenix."
24. And after *Roe*, the only time it was used at all was when Justice Stevens quoted from *Roe* in his separate opinion in *Planned Parenthood* v. *Casey*, 505 U.S. 833, 913 (1992) (Stevens, J., concurring in part and dissenting in part).
25. *Plyler* v. *Doe*, 457 U.S. 202, 213.
26. 410 U.S. at 157.
27. *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1885).
28. *Plyler* v. *Doe*, 457 U.S. 202 (1982).
29. *Holden* v. *Hardy*, 169 U.S. 366, 389-90 (1898). Still, the Court looks to substantive state law to ascertain the persons to whom the national general principles of justice apply. *E.g*. *McArthur* v. *Scott*, 113 U.S. 340, 392-404 (1884).
30. The term person includes both natural and artificial persons: *e.g*. "A person is such, not because he is human, but because rights and duties are ascribed to him. The person is the legal subject or substance of which the rights and duties are attributes. An individual human being considered as having such attributes is what lawyers call a *natural* person. Pollock, *First Book of Jurispr*. 110. Gray, *Nature and Sources of Law*, ch. II.," *Black's Law Dictionary* 1300 (4th ed. 1951); "*Law*. A human being (*natural p*[erson]) or body corporate or corporation (*artificial p*[erson]), having rights or duties recognized by law," *The Oxford Universal Dictionary*, pp. 1478-79, Third Edition [1944], Revised with addenda (1955).

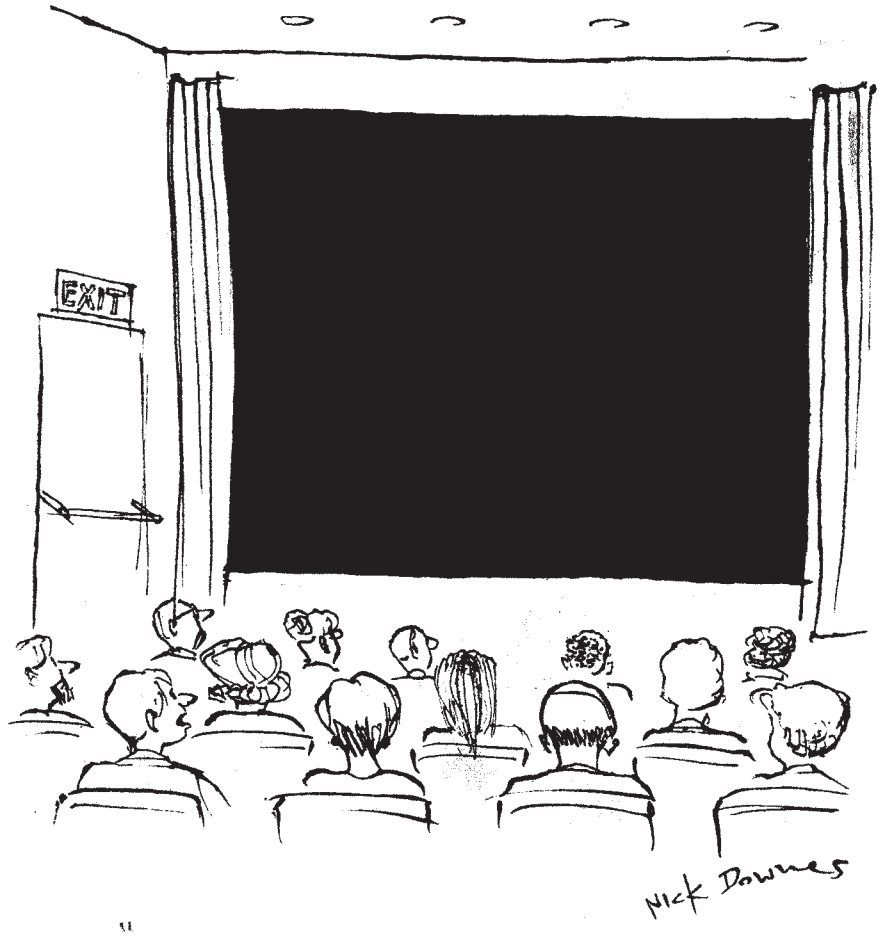
31. *Nelson* v. *Galveston, H. & S. A. Ry. Co*., 78 Tex. 761, 14 S.W. 1021 (1890) (*cited in* W. Prosser, *The Law of Torts*, 336 n.20 (4th ed.), *see Roe*, 410 U.S. at 161-62, n.63, n.64, n.65).
32. *Nelson* v. *Galveston*, 14 S.W. at 1022.
33. *Ibid.*
34. *Ibid.* at 1023 (emphasis added).
35. In *Leal* v. *C. C. Pitts Sand and Gravel, Inc*., 419 S.W.2d 820 (Texas 1967), the Supreme Court of Texas granted a right of action under the state's wrongful-death statute, on behalf of a viable child, six to seven months of gestation, as a "person," who suffered injuries in a motor-vehicle accident, was born prematurely, and died two days later.
36. *Black's Law Dictionary*, 714 (5th ed. 1979).
37. *Joseph Hall, Judge of Probate* v. *John Hancock*, 32 Mass. 255, 258; 1834 Mass. LEXIS 13, 6; 15 Pick. 255, 258 (1834).
38. *McArthur* v. *Scott*, 113 U.S. 340, 381-82 (1884) (emphasis added). The Rule was also cited with approval in *Hopkins* v. *Grimshaw*, 165 U.S. 342, 355 (1897).
39. Louisell, "Abortion, The Practice of Medicine and the Due Process of Law," 16 *U. C. L. A. L. Rev*. 233, 236 (1969), citing *In re Holthausen's Will*, 175 Misc. 1022, 26 N.Y.S.2d 140 (Sur. Ct. 1941), a decision which in turn contains numerous case citations.
40. *Ballentine's Law Dictionary: Latin Phrases-Maxims*, 379 (1916), *Bouvier's Law Dictionary*, 2154 (8th ed. 1914). *See Shone* v. *Bellmore*, 75 Fla. 515, 78 So. 605 (1918).
41. *Hall* v. *Hancock*, 32 Mass. 255, 257-58; 1834 Mass. LEXIS 13, 5; 15 Pick. 255, 257-58 (1834).
42. *Gray* v. *State*, 77 Tex. Cr. R. 221, 223-24 (1915) (*see* 410 U.S. at 136 n.27).
43. *U.S.* v. *Holte*, 236 U.S. 140, 145 (1915).
44. *See* http://www.abortionessay.com/files/beare.html (last visited April 15, 2009); Gregory J. Roden, "*Roe*'s Abortion Mythology," 31 *Human Life Review*, no. 4, 65 (Fall 2005).
45. 410 U.S. at 136 n.27: "*Contra*, *Mills* v. *Commonwealth*, 13 Pa. 631, 633 (1850); *State* v. *Slagle*, 83 N.C. 630, 632 (1880)."
46. Yet, even before the War of Independence, the colonies held even pre-quickening abortions to be criminal. J. Dellapenna, *Dispelling the Myths of Abortion History*, 220 n.283 (Carolina Academic Press 2006) (*citing Commonwealth* v. *Lambrozo*, 53 *Md. Archives* 387-91 (1663); *Commonwealth* v. *Brooks*, 10 *Md. Archives* 464-65, 486-88 (1656)).
47. *See United States* v. *Morrison*, 529 U. S. 598 (2000) (Congress may not regulate noneconomic, violent intrastate crime); Cohens *v*. Virginia, 19 U.S. (6 Wheat.) 264, 426 (1821) (Marshall, C.J.) ("Congress has a right to punish murder in a fort or other place within its exclusive jurisdiction, but no general right to punish murder committed within any of the States.").
48. *Roe*, 410 U.S. at 135 n.27.
49. *Ibid*. at 138.
50. *Ibid*. at 136.
51. *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591 (1834).
52. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 65-68 (1996) (Justice Souter, with whom Justice Ginsburg and Justice Breyer joined, dissenting) ("Virtually every state reception provision, be it constitutional or statutory, explicitly provided that the common law was subject to alteration by statute. The New Jersey Constitution of 1776, for instance, provided that 'the common law of England, as well as so much of the statute law, as have been heretofore practised in this Colony, shall still remain in force, until they shall be altered by a future law.' Just as the early state governments did not leave reception of the common law to implication, then, neither did they receive it as law immune to legislative alteration.")
53. *Twining* v. *State of New Jersey*, 211 U.S. 78, 101 (1908).
54. *Eisenstadt* v. *Baird*, 405 U.S. 438, 442 (1972).
55. *McArthur* v. *Scott*, 113 U.S. 340 (1884).
56. *Weber* v. *Aetna Casualty & Surety Co*., 406 U.S. 164 (1972) ("We think a posthumously born illegitimate child should be treated the same as a posthumously born legitimate child, which the Louisiana statutes fail to do.").
57. *Wagner* v. *Finch*, 413 F.2d 267 (5th Cir. 1969).
58. *Bonbrest* v. *Kotz*, 65 F. Supp. 138 (1946).
59. *Simmons* v. *Howard University*, 323 F. Supp. 529 (1971).
60. *Sox* v. *United States*, 187 F. Supp. 465 (1960).
61. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).
62. *McArthur* v. *Scott*, 113 U.S. 340, 404 (1884) ("[A] decree annulling the probate of a will is not

merely irregular and erroneous, but absolutely void, as against persons interested in the will and not parties to the decree, and as these plaintiffs were neither actually nor constructively parties to the decree setting aside the will of their grandfather, it follows that that decree is no bar to the assertion of their rights under the will.").

63. *Doe* v. *Scott*, 321 F. Supp. 1385 (N.D. Ill. 1971), *cert. denied* 409 U.S. 817 (1972).
64. The Fourteenth Amendment's municipal-law restriction prohibits federal legislation that outlaws purely private wrongs "unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings." *Civil Rights Cases*, 109 U.S. 3, 17 (1883). This has led to an argument that the states would still be free to allow abortion, falling under the category of a "private wrong," even if unborn children were given full protection as persons. Yet, such "wrongful acts" cannot be protected "by some shield of state law or state authority." *Ibid*.; *see United States* v. *Guest*, 383 U.S. 745 (1966), and the "Mississippi Burning" case *United States* v. *Price*, 383 U.S. 787 (1966). Moreover, "The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *DeShaney* v. *Winnebago County Dept. of Social Servs*., 489 U.S. 189, 197 n.3 (1989). This equal protection could be effected by pro-life groups reporting any suspected abortuaries to state authorities; any inaction of state authorities to prosecute the abortionists could then be taken up by the Justice Department. Going further, "Congress is clothed with direct and plenary powers of legislation over the whole subject . . . as in the regulation of commerce . . . among the several states." *Civil Rights Cases*, 109 U.S. 3, 18 (1883). Besides the Fourteenth Amendment Equal Protection of the class of unborn persons, Congress could directly outlaw abortion under the Commerce Clause, such as it did with the Partial-Birth Abortion Ban Act of 2003. *Gonzales* v. *Carhart*, 550 U.S. 124 (2007). A full answer to this argument is beyond the scope of this article. Suffice it to say, the assertion that the status of unborn children would not be improved by recognition of their personhood is to argue that the status of African Americans and other minorities has not been improved by their personhood under the Fourteenth Amendment, which is contradicted by history.
65. *See* Means, *The Phoenix*, at 404. Incredibly, Means goes on to state:

> The question is not . . . whether or not "The Unborn Offspring of Human Parents is an Autonomous Human Being." Of course it is. It is "human," since it was produced by human parents, and it is a "being," since it exists. And it is "autonomous," if nothing more is meant by that adjective than that it possesses a unique genetic organization. The question is whether, prior to birth, the offspring of human parents is a human *person*. Only *persons* are the subjects of legal rights, whether constitutional or other.

Ibid. at 409.
66. *Civil Rights Cases*, 109 U.S. 3, 11 (1883).



"I like film noir too, but this is ridiculous."

A Fool's Errand: State "Personhood" Proposals

Paul Benjamin Linton

There is no shortage of bad ideas in the pro-life movement. Here's the most recent one: state "personhood" proposals. These proposals, drafted as either state constitutional amendments or state statutes, purport to recognize unborn children as constitutional "persons," and are intended to challenge the Supreme Court's holding in *Roe* v. *Wade*[1] that the unborn child is not a "person," as that word is used in § 1 of the Fourteenth Amendment.[2] Failing that, they are intended to persuade the Court to overrule *Roe* and return the issue of abortion to the states. Such proposals, which, by last count, are being promoted in more than one-half of the states by Personhood USA, the American Life League, and the Thomas More Law Center (Ann Arbor), are unlikely to do either, even assuming that they are ultimately enacted by state legislatures or approved by the electorate (Colorado's Initiative 48, a "personhood" measure, was defeated by a margin of almost 3 to 1 last November).

In articles previously published in the *Human Life Review* and *First Things*, I've explained in detail why, in the absence of a federal constitutional amendment, the Supreme Court will not recognize the unborn child as a "person" within the meaning of the Fourteenth Amendment; why the recognition of "personhood," although desirable, is not the "cure-all" for ending abortion; and, further, why, in my opinion, we do not even have the votes on the Court to take the lesser, but critically important, step of simply overruling *Roe* and restoring the states' authority over abortion.[3] Pursuing "personhood" litigation and other purist goals at the expense of incremental advances in abortion law and policy will lead only to more pro-life defeats and demoralize the pro-life movement. It will do little or nothing to end abortion. In law, as in politics, there is no such thing as a "no-cost" defeat. I would refer interested readers to those articles for my analysis.

Rather than going over the same ground yet again, I want to focus in this article on the language and underlying suppositions of state "personhood"

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proposals. These proposals, in my judgment, have been drafted with breathtaking, indeed, stunning, ignorance, or even defiance, of basic state and federal constitutional principles.

The Hierarchy of the Law

Probably the most elementary error that infects state "personhood" proposals is the failure to recognize the hierarchy of the law. Neither a state constitution nor a state statute can define words used in the federal constitution or dictate how those words shall be interpreted by state and federal courts. The starting point for the discussion here is the Supremacy Clause of the United States Constitution, which provides, in relevant part, that "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, *any Thing in the Constitution or Laws of any State to the Contrary notwithstanding*."[4] In the hierarchy of the law, the federal Constitution is supreme and takes precedence over a conflicting state constitutional provision or state statute. As Justice Brennan stated in *Reynolds* v. *Sims*,[5] "When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls."[6] But, it may be asked, who decides what the federal constitution means? The judiciary.

It is basic "Civics 101" that the legislature makes the laws, the judiciary interprets them, and the executive enforces them. In the case of the federal Constitution, the law, *i.e.*, the Constitution, was made by the Framers and adopted by the states. And its interpretation is quintessentially a matter for the judiciary. As the Supreme Court has said, "It is the responsibility of this Court . . . to define the substance of constitutional guarantees."[7] In rejecting an attempt by Congress to overturn a decision of the Supreme Court construing the Free Exercise of Religion Clause of the First Amendment,[8] the Court stated, "The power to interpret the Constitution in a case or controversy remains in the Judiciary."[9] More than 50 years ago, the Supreme Court, in a case involving the enforcement of the school-desegregation cases, stated that the Court's interpretation of the United States Constitution *is* "the supreme law of the land," which is of binding effect on the states by virtue of the Supremacy Clause, art. VI, cl. 2.[10]

In *Roe*, as previously noted, the Supreme Court held that the unborn child is not a "person" as that word is used in § 1 of the Fourteenth Amendment.[11] That holding, *which no Justice on the Court has ever questioned*, is an interpretation of the federal Constitution. Neither the meaning of the word "person," as used in the Fourteenth Amendment, nor the interpretation the Supreme Court has given that word—that it does not include unborn children—may be changed by a *state* constitutional amendment (or by a

state statute), only by a *federal* constitutional amendment (or by a decision of the Court overruling the personhood holding). That the meaning of words used in the federal Constitution cannot be defined by a state constitutional amendment (or statute) is, or should be, self-evident. Otherwise, there could be conflicting interpretations of what those words mean. The federal Constitution cannot mean one thing in one state and something entirely different in another state. With respect to the issue at hand, could a state, by amending its own constitution, redefine the word "person" as that term is used in the Fourteenth Amendment to *exclude* members of a minority group or, say, aliens?[12] Could another state, by amending its own constitution, redefine the word "person" to *include* other species? It cannot be the case that each state has the authority to define—by a *state* statute or a *state* constitutional amendment—what words in the *federal* Constitution mean, yet that is precisely what the proponents of state "personhood" proposals apparently believe. To the extent that they are aware of the doctrine of judicial supremacy—that the Supreme Court has the last word in interpreting the Constitution—they deplore it, but they offer no intellectually coherent explanation of how they expect to circumvent that doctrine.

A related error infects state "personhood" bills that purport to define, by statute, what the words in a state constitution mean.[13] Although none of these bills has been enacted into law, they suffer from the same infirmity as state constitutional amendments that attempt to define the meaning of words used in the federal Constitution. A state legislature may not, *by enacting a statute*, define, interpret, amend, modify, repeal, or add to language set forth in a state *constitution*. If this were not the case, then there would be no need for the amendment process established by the state constitution requiring, among other things, a favorable vote of the people. The state legislature could simply amend the state constitution (without a vote of the people) anytime it decided that it needed amending or did not approve of a state-supreme-court decision interpreting the state constitution. But that is quite obviously not within the power of any state legislature.[14]

State Action vs. Private Action

Another flaw in state "personhood" amendments, of which their proponents seem oblivious, is their failure to recognize the distinction between state action and private action. With very few exceptions, none of which is relevant here, constitutional guarantees—both state and federal—are guarantees against the government only, not private individuals.[15] As the late Chief Justice Rehnquist stated in his opinion for the Court in *DeShaney* v. *Winnebago County Dep't of Social Services,*[16] the Due Process Clause of the Fourteenth

Amendment "was intended . . . to protect the people from the State, not to ensure that the State protected them from each other."[17] Accordingly, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."[18] The distinction between state action, which is subject to constitutional constraints, and private action, which is not, may be illustrated by an example. If the police, without a valid search warrant and in the absence of exigent circumstances, forcibly enter my neighbor's house and discover that he has been cultivating marijuana plants, their conduct violates his state and federal constitutional right not to be subjected to an unreasonable search. Because of the exclusionary rule, any incriminating evidence they seize (the marijuana plants and any accompanying drug paraphernalia) could not be used in any criminal prosecution against him. If, on the other hand, a private citizen breaks into my neighbor's house and steals his coin collection, a crime has been committed (burglary), but my neighbor's constitutional rights have not been violated.

Without exception, state "personhood" amendments, by their own terms, do not reach private conduct. Instead, they amend various provisions in state Bills (or Declarations) of Rights. But those provisions secure rights only against the state, not private actors. Such amendments, if adopted, would directly affect only state action, not the acts of private individuals. For example, a state "personhood" amendment may well prevent the state itself from engaging in abortion, e.g., by using state funds to pay for abortions or allowing abortions to be performed by publicly employed physicians or in public hospitals. But it would have no effect on abortions performed by physicians in private practice or employed by privately owned and operated clinics. Virtually all abortions are performed in the private sector. Without implementing legislation (which is discussed in the next section of this article), state "personhood" amendments would not reach private conduct. That, in turn, suggests that these amendments would not necessarily generate the "test case" to challenge *Roe* that their supporters think that they would. Apart from the limited categories of abortion for which federal reimbursement is available under the current version of the Hyde Amendment (life-of-the-mother, rape and incest),[19] states have no federal constitutional obligation to use state funds to pay for any portion of the cost of abortions for indigent women,[20] much less to make public hospitals available for such procedures.[21] Properly understood, a "personhood" amendment, in and of itself, would not forbid what *Roe* says must be allowed (abortion for any reason before viability).[22] Moreover, unlike some state courts, federal courts may not render advisory opinions. Under the Constitution, they may adjudicate only "Cases" or "Controversies."[23] But, without an actual or threatened conflict between

the language in a "personhood" amendment and the abortion liberty recognized in *Roe*, there is no "Case" or "Controversy." So, where is the "test case"? And if, contrary to my opinion, state "personhood" amendments (or statutes) *are* interpreted to prohibit abortion (in which case, of course, they would be declared unconstitutional to that extent), they could overturn the entire body of law developed over the years regulating the practice of abortion. That is because, by definition, you cannot *regulate* what you *prohibit* (e.g., drugs and prostitution).

Prohibitions vs. Mandates

In an attempt to remedy the deficiencies of state "personhood" proposals, which, by their own terms, would not reach private (as opposed to public) conduct, a few of these proposals have been recast to include language directing the legislature to implement the "personhood" language by "appropriate legislation."[24] What the drafters of these proposals do not appear to understand, however, is that state constitutional *mandates* (language in a state constitution directing the legislature to enact legislation with respect to a given issue), as opposed to state constitutional *prohibitions* (language limiting what the legislature may do) are not self-executing, nor are they judicially enforceable.[25] Legislatures normally comply with constitutional mandates, but their failure (or refusal) to do so does not present a justiciable controversy. Thus, notwithstanding language in a state "personhood" amendment directing the legislature to enact "appropriate legislation" to enforce the provisions of the amendment, such language is not judicially enforceable in the event the legislature in question fails (or refuses) to enact such legislation.

Specific Examples

Apart from the general criticisms I have set forth, space does not permit me to provide specific comments on all of the "personhood" amendments that have been proposed to date. Nevertheless, two of them—from Mississippi and Montana—will be illustrative of the lack of thought that has gone into their drafting.

In Mississippi, petitions are currently being circulated for signatures to place Initiative Measure No. 26 on the ballot for the November 2010 election. Initiative Measure No. 26 would define the terms "person" or "persons," as used in art. III of the Mississippi Constitution (the state Bill of Rights), to include "every human being from the moment of fertilization, cloning or the functional equivalent thereof." The proposed measure, however, violates the limitations placed on initiatives by the state constitution. Section 273(5)(a)

of the Mississippi Constitution provides: "The initiative process shall not be used: (a) For the proposal, modification or repeal of any portion of the Bill of Rights of this Constitution.[26] The Bill of Rights *is* art. III of the state constitution. In flagrant disregard of the limitations placed on the initiative mechanism by § 273(5)(a), however, Initiative Measure No. 26 purports to amend art. III by adding a new section to the Bill of Rights defining the term "person" or "persons" as those terms are used therein. What the proposed initiative purports to do *cannot* be done via the initiative process.

The Mississippi Supreme Court has recognized that the initiative process may not be used to amend any portion of the Bill of Rights.[27] Moreover, the state supreme court has held that any elector of the state has standing to challenge an initiative measure.[28] In any such challenge, an opponent of an initiative measure may question the constitutionality of the measure, i.e., "whether it is constitutional on its face or satisfies the conditions and requirements as set forth in section 273."[29] A challenge to an initiative may be brought "before the initiative petition is either circulated among the voters for signatures or before it is placed on the ballot for consideration by the people in a general election."[30] The bottom line is that Initiative Measure No. 26 violates § 273 and, if challenged, will be struck from the ballot. And, assuming that no such challenge is brought *before* the initiative is voted on by the people (if sufficient signatures are obtained to place the measure on the ballot) and the initiative is approved, it will be challenged *thereafter* and will be declared invalid, as exceeding the express limitations placed on the initiative by § 273(5)(a).[31]

In Montana, petitions are currently being circulated for signatures to place Constitutional Initiative 102 (CI-102) on the ballot for the November 2010 election. CI-102 would define the word "person," as used in the due process clause of the Montana Constitution (art. II, § 17), to include "all human beings, irrespective of age, health, function, physical or mental dependency or method of reproduction, from the beginning of the biological development of that human being." CI-102, § 1. The initiative measure does not amend any other provision of the Montana Constitution. The drafters of CI-102 have obviously overlooked the Montana Supreme Court's decision in *Armstrong* v. *State*,[32] which recognized a state right to abortion under the *privacy* guarantee of the Montana Declaration of Rights (art. II, § 10),[33] not the *due process* guarantee (art. II, § 17).[34] CI-102, which would amend only the due process provision of the Declaration of Rights, would not eliminate the privacy-based right to abortion recognized in *Armstrong*. *If* CI-102 qualifies for the ballot (a similar effort failed to attract enough signatures to be placed on the November 2008 ballot), *if* it is allowed to remain on the

ballot by the Montana Supreme Court (which is unlikely),[35] and *if* it is approved by the electorate (which is equally unlikely), Montana will have the most schizophrenic state constitution in the country with respect to the issue of abortion. One section of its Declaration of Rights (due process) would effectively prevent the state itself (or physicians employed by the state) from paying for or performing abortions which, under CI-102, would violate the due process rights of unborn children, while another section (privacy) would prevent the state from prohibiting abortions from being performed by privately employed physicians in their offices or in privately owned and operated clinics.[36]

A Practical and Useful Alternative

Instead of tilting at windmills with state "personhood" proposals, pro-life advocates may wish to consider supporting state constitutional amendments that would actually make a difference in the battle over abortion. Twelve state supreme courts have already recognized a state constitutional right to abortion that is separate from, and independent of, the federal right to abortion recognized in *Roe* v. *Wade*,[37] and other state supreme courts may be asked to recognize such a right, as well.[38] To overturn those decisions (and to forestall similar decisions in other states), I would suggest the following state constitutional amendment:

Section 1. The policy of the State of [insert name of state] is to protect the life of every unborn child from conception until birth, to the extent permitted by the federal constitution.

Section 2. Nothing in this constitution shall be construed to grant or secure any right relating to abortion or the funding thereof.

Section 3. No public funds shall be used to pay for any abortion, except to save the life of the mother.

Section 1 is based on Amendment 68, § 2, of the Arkansas Constitution.[39] Section 2 is based on the last sentence of art. I, § 2, of the Rhode Island Constitution (1986).[40] And section 3 is based on Amendment 68, § 1, of the Arkansas Constitution, and art. V, § 50, of the Colorado Constitution.[41]

The language of this proposed amendment would achieve three objectives: first, it would enunciate a public policy of protecting unborn human life, to the extent permitted by the federal constitution; second, it would neutralize the state constitution as an independent source of abortion rights, thus overturning or preventing state "mini-*Roe*" decisions; and third, it would prohibit public funding of abortion, except to save the life of the mother. The proposed draft language, or something similar, would also avoid creating a costly and useless "test case" prematurely challenging *Roe*.

Section 2 of the foregoing draft amendment could be used as the complete text of an "abortion neutrality" amendment that is intended simply to neutralize the state constitution as an independent source of abortion rights.[42] To avoid ambiguity over what "conception" means (fertilization or implantation) and to avoid a debate over IVF technology, § 1 could be redrafted to read as follows:

The policy of the State of [insert name of state] is to protect the life of every unborn child at every stage of gestation *in utero* [or "at every stage of pregnancy"] from fertilization until birth, to the extent permitted by the federal constitution.

And, to avoid any Supremacy Clause challenge based on the Hyde Amendment, § 3 could be redrafted to read as follows:

No public funds shall be used to pay for any abortion, except to save the life of the mother, or as otherwise required by the federal constitution.

Whether this language should be introduced in a given state legislature, or proposed through a citizen-sponsored initiative, is, of course, a question that must be answered on a state-by-state basis. Obviously, the amendment I have proposed, or even a streamlined, one-section neutrality amendment, is not likely to be proposed, much less passed, in many of the states whose supreme courts have recognized a state constitutional right to abortion (California, Massachusetts, New Jersey, New Mexico, New York, Vermont, and probably Minnesota). But in at least some of these states (Alaska, Mississippi, Tennessee, and perhaps Florida and Montana), as well as in a number of states whose supreme courts have not yet addressed this issue, an amendment along the lines I have suggested might be politically possible, either as a legislatively proposed amendment or a citizen-initiated measure (where such initiatives are permitted by the state constitution). Whether it *is* possible remains a judgment for the people in that state to make.

Conclusion

There is a tremendous amount of frustration in the pro-life movement. That frustration, born of 37 years of unrealized hopes, deferred dreams, and judicial betrayals, is entirely understandable, but it is also dangerous—because it leads well-intentioned pro-lifers to act on the basis of emotion and impulse instead of reason and thought. Great historical injustices–such as slavery and the denial of civil rights to minority groups–have taken far longer than 37 years to rectify. In the case of slavery, it took more than 250 years and a Civil War; in the case of civil rights, it took almost 60 years,[43] and a sea change in judicial thinking regarding the proper meaning of the Equal Protection Clause of the Fourteenth Amendment. We need to be patient

and persevere. If we fail to control our desire to end abortion with reason and thought and, instead, allow emotion and impulse to determine our legal and political strategies, we will reap a harvest of bitterness—

in defeats at the ballot box, in state courts, in federal courts, all without advancing our cause one yard down the field. Such defeats breed ever-greater frustration, alienation from the effort, and, in some unbalanced minds, even violence. None of this is in the interest of the pro-life movement.

Supporters of the state "personhood" strategy firmly believe that they have found the "silver bullet" for bringing down *Roe*. But their belief is mistaken and their strategy is not a "silver bullet." It is, in fact, a blank, which may make a lot of noise and create an immense amount of fire and smoke, but will not have any impact on the abortion liberty recognized in *Roe*. *Roe* will be overruled only when we have at least five Justices on the Court who are convinced of its illegitimacy and understand that American society—men, women, and children—can live without legalized abortion. That day has not yet arrived but, in God's good time, it will.

NOTES

1. 410 U.S. 113 (1973).
2. *Id.* at 156-57. Section 1 provides, in relevant part, that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.
3. "Sacred Cows, Whole Hogs & Golden Calves," *Human Life Review* (Summer 2007); "This Dog Won't Hunt: A Reply to Gregory J. Roden," *Human Life Review* (Fall 2008); "How Not to Overturn *Roe* v. *Wade*," *First Things* (November 2002). Remarkably, one of my critics, Dan Woodard, has written that Justice Kennedy "is proud of his record of always *decreasing* the right of abortion, and he would never ever put that [record] in jeopardy." Emphasis added. Mr. Woodard must have missed school on the day Justice Kennedy, along with Justices O'Connor and Souter, announced their Joint Opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), which reaffirmed the core holding of *Roe*–that states may not prohibit abortion before viability. More generally, the obsession that Personhood USA and others have with Justice Kennedy, confidently assuming, even predicting, that he will be the "fifth vote" to overrule *Roe*, is entirely misplaced. Justice Kennedy has had many occasions to vote to overrule *Roe* and has never done so. Although it is always possible that he (or any other Justice on the Court) might change his mind, it would be presumptuous to assume that he will. As the psychologists are fond of saying, "The best predictor of future behavior is past behavior."
4. U.S. Const. art. VI, cl. 2 (emphasis added).
5. 377 U.S. 533 (1964).
6. *Id*. at 584.
7. *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356, 365 (2001).
8. *Employment Division, Dep't of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990).
9. *City of Boerne* v. *Flores*, 521 U.S. 507, 524 (1997).
10. *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958).
11. 410 U.S. at 156-57.
12. Somewhat less fancifully, could a state, by a state constitutional amendment, determine, contrary to Supreme Court precedent, *see Santa Clara County* v. *Southern Pacific Railroad*, 118 U.S. 394 (1886), that corporations are not "persons" within the meaning of § 1 of the Fourteenth Amendment?
13. *See*, e.g., North Dakota H.B. 1572 (61st Sess); South Carolina H.B. 3213 (116th Sess. 2005-

2006) (South Carolina H.B. 3526 (118th Sess.) (2009-2010) (carried over to next session).

14. State courts have uniformly held that the interpretation of a state constitution is an exclusive function (power) of the judiciary and that the legislature may not define language in the constitution, dictate to the courts the construction that should be given to constitutional provisions, or otherwise amend the constitution. *See People ex rel. Juhan* v. *District Court for the County of Jefferson*, 430 P.2d 741, 745 (Colo. 1968) ("[t]he interpretation given by the courts to the constitution are incorporated in the instrument itself and are beyond the power of the legislative branch of government to change"); *Richardson* v. *Hare*, 160 N.W.2d 883, 886 (Mich. 1968) (legislature has no authority "to take a term or language in the Constitution, interpret it and make that legislative interpretation the law"); *State ex rel. Dawson* v. *Falkenheiner*, 15 S.W.2d 342, 343 (Mo. 1929) (legislature "has no power to give to the Constitution an interpretation which would be contrary to its terms" and "must enact its laws in accordance with the Constitution as construed [by the courts]"); *Thompson* v. *Talmadge*, 41 S.E.2d 883, 889-90 (Ga. 1947) ("construing the Constitution . . . is the function of the judiciary, and . . . the General Assembly has not power to make such construction"); *State* v. *Kuhnhausen*, 272 P.2d 225, 232 (Or. 1954) ("the ultimate power and duty of the courts to construe the constitution must rest with the courts alone," not the legislature); *State* v. *Eaton*, 133 P.2d 588, 593-94 (Mont. 1943) (same).
15. The Thirteenth Amendment, which bans slavery and involuntary servitude, is an exception. A very few state constitutional guarantees have been applied to purely private conduct. Generally speaking, however, state Bills (or Declarations) of Rights, like the federal Bill of Rights, apply only to state actors, not private actors.
16. 489 U.S. 189 (1989).
17. *Id*. at 196.
18. *Id*. at 197.
19. Although the Supreme Court has declined to decide the matter, *see Dalton* v. *Little Rock Family Planning Services*, 516 U.S. 474 (1996) (*per curiam*), the federal courts of appeals have uniformly held, on federal preemption principles (a state law conflicting with a federal law), that states participating in the Medicaid program (which is a state option) must pay their share of the cost of abortions for which federal reimbursement is available under the Hyde Amendment. *Elizabeth Blackwell Health Center for Women* v. *Knoll*, 61 F.3d 170 (3d Cir. 1995); *Hope Medical Group for Women* v. *Edwards*, 63 F.3d 418 (5th Cir. 1995); *Planned Parenthood Affiliates of Michigan* v. *Engler*, 73 F.3d 634 (6th Cir. 1996); *Little Rock Family Planning Services, P.A.* v. *Dalton*, 60 F.3d 497 (8th Cir. 1995), *rev'd on other grounds*, 516 U.S. 474 (1996); *Orr* v. *Nelson*, 60 F.3d 497 (8th Cir. 1995); *Hern* v. *Bye*, 57 F.3d 906 (10th Cir. 1995).
20. *Maher* v. *Roe*, 432 U.S. 464 (1977) (Constitution does not require states participating in the Medicaid program to pay for nontherapeutic abortions); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding Hyde Amendment prohibiting the use of federal funds to pay for abortion except those necessary to save the life of the pregnant woman); *Williams* v. *Zbaraz*, 448 U.S. 358 (1980) (upholding Illinois statute containing the same restriction).
21. *Poelker* v. *Doe*, 432 U.S. 519 (1977) (upholding municipal policy prohibiting the performance of abortions in city hospitals except when there was a threat of grave psychological injury or death to the pregnant woman); *Webster v. Reproductive Health Services*, 492 U.S. 490, 507-11 (1989) (upholding state statute prohibiting public employees from performing abortions and prohibiting the use of public facilities for the performance of abortions except those necessary to save the life of the pregnant woman).
22. It is at this point that some supporters of state "personhood" proposals interpose an objection. They claim that, with the adoption of a state "personhood" amendment, state equal protection principles would automatically bring unborn children within the scope and protection of the homicide statutes. Of course, if that were true, the amendment would be struck down as violating *Roe* v. *Wade*. But constitutional amendments are not criminal statutes. And courts have no constitutional, statutory, or common-law authority to extend the scope of criminal statutes (in this case, the homicide statutes) to persons or conduct that fall outside the reach of those statutes.
23. U.S. CONST. art. III, § 2.
24. This would include Montana Constitutional Initiative 102, which is currently being circulated for signatures in Montana and is discussed later in this article, as well as an earlier Montana initiative (Constitutional Initiative 100), which failed to qualify for the ballot in 2008.
25. *See*, e.g., *State of Arizona* v. *Boykin*, 508 P.2d 1151, 1154 (Ariz. 1973) (provision requiring the legislature to enact laws mandating an eight-hour day "in all employment by, or on behalf of the

State or any political subdivision of the State," art. XVIII, § 1, is not self-executing and is not judicially enforceable) (holding that art. XVIII, § 1, does not confer a "right to an eight-hour day"); *Arizona Eastern R. Co.* v. *Matthews*, 180 P. 159, 163 (Ariz. 1919) (same with respect to provision, art. XVIII, § 7, requiring the legislature to enact a law making an employer liable to an employee in "hazardous occupations"); *People v. Vega-Hernandez*, 225 Cal. Rptr. 209, 218 (Ct. App. 1986) (provision requiring the legislature to enact laws to implement the right of crime victims to restitution, art. I, § 28(b), is not self-executing) (holding that non-prohibitory constitutional provisions that direct the legislature to enact particular legislation are not self-executing); *Spinney* v. *Griffith*, 32 P. 974, 975 (Cal. 1896) (provision requiring legislature to enact laws "for the speedy and efficient enforcement" of statutes creating mechanics liens, art. XIV, § 3, is not self-executing and requires implementing legislation); *Borchers Bros.* v. *Buckeye Incubator Co.*, 28 Cal. Rptr. 697, 698-99 (Sup. 1963) (same); *Jack v. Village of Grangeville*, 74 P. 969, 974 (Idaho 1903) (provision requiring legislature to enact laws establishing "reasonable maximum rates . . . . to be charged for the use of water sold, rented, or distributed for any useful or beneficial purpose," art. VI, § 15, was not self-executing) (holding that until legislature provided a method for fixing rates, parties could contract for rates that were mutually agreeable); *State on behalf of Garcia* v. *Garcia*, 471 N.W.2d 388, 390-91 (Neb. 1991) (provision requiring legislature to enact laws governing lawsuits by and against the State, art. V, § 22, was not self-executing) (holding that trial court had no authority to award attorney fees incurred by a special prosecutor in an action to collect child-support payments in the absence of legislation authorizing such an award).

26. MISS. CONST. art. XV, § 273(5)(a).
27. *In re Proposed Initiative Measure No. 20*, 774 So.2d 397, 402 (Miss. 2000) (dictum).
28. *Id*. at 402.
29. *Id*. at 401.
30. *Id*.
31. When I brought this to the attention of one of the attorneys supporting the initiative effort in Mississippi, he assured me that he was aware of § 273(5)(a) and did not consider it "an absolute bar to the proposed amendment." For unspecified "strategic reasons," however, he declined to share his reasoning with me. Of course, I cannot comment on something I haven't heard or read, but, on the face of it, it would appear to me, as I think it would to any other reasonably intelligent attorney, that the initiative mechanism cannot be used to amend the Mississippi Bill of Rights. Initiative Measure No. 26 is going to be stillborn.
32. 989 P.2d 364 (Mont. 1999).
33. *Id*. at 374 (*Gryczan* v. *State*, 942 P.2d 112, 122 (Mont. 1997) (striking down state sodomy law)).
34. In a brief coda to its opinion, the *Armstrong* majority suggested that "the rights of personal and procreative autonomy at issue here also find protection in more than just Article II, Section 10." *Id*. at 383 (citing, as possible sources, art. II, §§ 3 (inalienable rights), 4 (individual dignity), 5 (freedom of religion), 7 (freedom of speech), and 17 (due process)). Nevertheless, the majority opinion was based squarely on art. II, § 10 (privacy). *Id*. at 384 (summarizing holdings).
35. Montana is one of a handful of states that allow pre-ballot challenges to the *substantive*, as opposed to the *procedural*, constitutionality of a ballot initiative. *See State ex rel. Montana Citizens for the Preservation of Citizens' Rights* v. *Waltermire*, 729 P.2d 1283, 1285 (Mont. 1986) (enjoining submission of citizen-initiated measure proposing state constitutional amendment directing the state legislature to apply to Congress under art. V of the United States Constitution to call a convention to consider a balanced budget amendment): *State ex rel. Steen* v. *Murray*, 394 P.2d 761 (Mont. 1964) (enjoining submission of citizen-initiated measure proposing statute on gambling). *See also Union Electric Co.* v. *Kirkpatrick*, 678 S.W.2d 402, 405 (Mo. 1984); *State ex rel. Dahl* v. *Lange*, 661 S.W.2d 7, 8 (Mo. 1983); *State ex rel. Rotter* v. *Curtin*, 941 S.W.2d 498, 500 (Mo. 1997); *Hazelwood Yellow Ribbon Committee* v. *Klos*, 35 S.W.3d 457, 468-69 (Mo. Ct. App. 2000); *In re Initiative Petition No. 349*, 838 P.2d 1, 8 (Okla. 1992) (citing cases) (striking citizen-initiated abortion ban from ballot); *White* v. *Welling*, 57 P.2d 703, 705 (Utah 1936) (if proposed law "showed unquestionably and palpably on its face that it was unconstitutional . . . it is quite likely that this court would refuse to issue the mandamus [to order the secretary of state to place the proposition on the ballot] on the theory that it would not compel the secretary of state to do something which would in the end be unavailing"); *National Abortion Rights Action League* v. *Karpan*, 881 P.2d 281, 288 (Wyo. 1994) ("[w]e hold that an initiative measure that contravenes direct constitutional language or constitutional

language as previously interpreted by the highest court of a state or of the United States, is subject to [pre-ballot] review under the declaratory judgment statutes"). In states following the minority rule, if the state supreme court determines that the measure, on its face, would violate the state constitution (in the case of a statutory initiative) or the federal constitution (in the case of either a statutory or constitutional initiative), then it will strike the entire measure from the ballot or, at a minimum, sever the unconstitutional provisions. The majority rule, which is followed in the overwhelming majority of states that have an initiative mechanism in their constitution, is that challenges to the substantive constitutionality of a citizen initiative may not be brought before the measure is voted on by the people. Until then, the constitutionality of the measure is not considered "ripe" for judicial review.

36. The same problem affects the "personhood" initiative that is now being considered in California, which fails to amend the section of the California Constitution under which a right to abortion has been recognized. See *Committee to Defend Reproductive Rights* v. *Myers*, 625 P.2d 779 (Cal. 1981) (deriving state right to abortion from addition of privacy language to art. I, § 1, of the state constitution).
37. *State of Alaska* v. *Planned Parenthood of Alaska*, 35 F.3d 30 (Alaska 2001); *State of Alaska, Dep't of Health & Human Services* v. *Planned Parenthood of Alaska, Inc*., 28 P.3d 904 (Alaska 2001); *Valley Hospital Ass'n* v. *Mat-Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997); *Committee to Defend Reproductive Rights* v. *Myers*, 625 P.2d 779 (Cal. 1981); *In re T.W.*, 551 So.2d 1186 (Fla. 1980); *Moe* v. *Secretary of Administration & Finance*, 417 N.E.2d 387 (Mass. 1981); *Women of the State of Minnesota* v. *Gomez*, 542 N.W.2d 17 (Minn. 1995); *Pro-Choice Mississippi* v. *Fordice*, 716 So.2d 645 (Miss. 1998); *Armstrong* v. *State*, 989 P.2d 364 (Mont. 1999); *Right to Choose* v. *Byrne*, 450 A.2d 925 (N.J. 1982); *New Mexico Right to Choose/ NARAL* v. *Johnson*, 975 P.2d 841 (N.M. 1998); *Hope* v. *Perales*, 634 N.E.2d 183 (N.Y. 1994); *Planned Parenthood of Middle Tennessee* v. *Sundquist*, 38 S.W.3d 1 (Tenn. 2000); *Beacham* v. *Leahy*, 287 A.2d 836 (Vt. 1972).
38. Whether abortion has been, or would likely be, recognized as an independent state constitutional right is the subject of my book, ABORTION UNDER STATE CONSTITUTIONS *A State-by-State Analysis* (Carolina Academic Press 2008), the first full-length treatment of the topic by anyone on either side of the abortion debate.
39. "The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution." ARK. CONST. amend. 68, § 2 (1988).
40. "Nothing in this section [guaranteeing due process and equal protection] shall be construed to grant or secure any right relating to abortion or the funding thereof." R.I. CONST. art. I, § 2 (last sentence) (2004).
41. "No public funds will be used to pay for any abortion, except to save the mother's life." ARK. CONST. amend. 68, § 1. "No public funds shall be used by the State of Colorado, its agencies or political subdivisions to pay or otherwise reimburse, directly or indirectly, any person, agency or facility for the performance of any induced abortion, PROVIDED HOWEVER, that the General Assembly, by specific bill, may authorize and appropriate funds to be used for those medical services necessary to prevent the death of either a pregnant woman or her unborn child under circumstances where every reasonable effort is made to preserve the life of each." COLO. CONST. art. V, § 50 (West 2001). The funding bans in the Arkansas and Colorado Constitutions have been declared unconstitutional, but only to the extent that they do not permit state funds to be used to pay for the state's share of those abortions for which federal reimbursement is available under the Hyde Amendment. *Little Rock Family Planning Services, P.A.* v. *Dalton*, 60 F.3d 497 (8th Cir. 1995), *rev'd on other grounds*, 516 U.S. 474 (1996); *Hern* v. *Bye*, 57 F.3d 906 (10th Cir. 1995). Otherwise, the amendments are constitutional and in force.
42. *See*, e.g., the first sentence of Tennessee Senate Joint Resolution 127: "Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion." SJR 127, which the author assisted in drafting and is intended to overturn the Tennessee Supreme Court's decision in *Planned Parenthood of Middle Tennessee* v. *Sundquist*, 38 S.W.3d 1 (Tenn. 2000), was approved by the Tennessee Legislature in 2009 and, once it is approved again by the legislature (by a two-thirds vote), will be placed on the ballot for the voters' consideration.
43. From *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), to *Brown* v. *Board of Education* (1954).

Opposing "The Propaganda of the Deed":

Eugenic Death-making & the Disabled

Mark P. Mostert

We are at a critical juncture in the fight against death-making. Acceptance of assisted suicide is likely to increase now that it has been legalized in Oregon and Washington state; similar initiatives have been proposed across the rest of the U.S. It is likely that increased social acceptance of assisted suicide (and, eventually, euthanasia) will continue to reinforce several dangerous pro-death ideas, including the basic notion that we can do away with people just as we rid ourselves of old, worn-out, or otherwise imperfect possessions. Such tectonic shifts in attitude will inevitably mean that our most vulnerable populations, including and especially people with disabilities, will be seen as disposable.

In this context, I think, there are two questions that need to be carefully addressed: First, how did we get to this point? And second, what might we do about it?

To provide at least a partial answer to these questions, I discuss (a) the notion of death-making, (b) death-making as it relates to people with disabilities, (c) the renewed emphasis on eugenic euthanasia, and (d) *the propaganda of the deed*. I then discuss two future strategic directions that I see as critical in stemming the pro-death tide.

The Nature of Death-Making

Most people view death as the last stage of the existential cycle of life, a universal rhythm ensuring a living communal humanity into the future. It is this fundamental notion that shapes, in part, the powerful urge to procreate, to leave a living legacy after we're gone, and to grapple with what death means and how we should approach it. It is not possible, therefore, to consider the human condition without the understanding that death is an inevitable part of what we are. However, in the context of assisted suicide and euthanasia, I make a fundamental distinction between natural death and my notion of "death-making."

Death-making is very different from death's simply *happening*, although the result is the same. Death-making implies an action; it preempts the natural course of events. Death-making is the chief characteristic of assisted suicide

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and the hallmark of euthanasia. Its purpose is making one who is living, *dead*. On this point, there is surely little disagreement. Further, death-making is a stealthily destructive act because it masquerades as compassion and care, a deceptive logic declaring that death-making is for the best, an act of true and unselfish benevolence, and a way of acknowledging that because life isn't the same as it used to be, it needs to be terminated.

Across the world, countries, like so many dominoes, have fallen, one after the other, to the lowest common denominator—that making people dead is acceptable and, in some quite deranged corners of the planet, that it should be required, and even celebrated. Thus, we are on the cusp of an unprecedented development that was previously unthinkable, even in our own lifetimes: The pro-death lobby has twisted societal thinking from seeing assisted suicide and euthanasia as unethical or immoral in almost every instance to beginning to view death-making as a legitimate ritual.

Rituals consist of a social set of behaviors and events determining social conduct. I believe we are at a place where death-making is becoming a ritual like marriage or burial. This is how it works: A "capable" person voluntarily expresses his or her wish to die because of some terminal or hopeless illness. A physician (and perhaps a second doctor) verifies the terminal or hopeless illness. The person requesting assisted suicide or euthanasia makes a witnessed, written, signed, and dated request for death so that medication can be prescribed for the purpose of ending life in a "humane and dignified" manner. The fatal medication is then obtained, and the patient chooses a time and place to die. The patient then takes the fatal dose, and dies.

There you have it: the ritual of assisted suicide. The same will be true when euthanasia is legalized and, eventually, socially accepted. And it is in this context of ritualized death-making that people with disabilities are likely to be among the first to succumb.

Death-Making and People with Disabilities

There is no question that the developed world does more for people with disabilities than is done anywhere else. We have more laws, more accommodations, more advocacies, and more support for them than at any time in history. In the U.S., as in many other developed countries, people with disabilities are the largest minority group. Under various disability classifications, approximately 54 million Americans have at least one disability, and this number is expected to double in the next two decades.

Even this number includes only a portion of the disabled population. For example, classified differently, there are 133 million people in the U.S. living with a chronic health condition, and their numbers are projected to increase

to 150 million by 2030. Seventy-five percent of people with chronic health conditions are younger than 65. Many will have chronic health conditions severe enough that, by any standard, they are medically disabled.

People with significant disabilities conveniently fit the aims of the pro-death agenda: They consume significant medical and other resources; they often have impaired quality of life and diminished autonomy; in many instances, they suffer greatly. I cannot think of a more vulnerable group, who will be increasingly targeted for death.

Here's my blunt paraphrase of how the pro-death lobby will rationalize death-making for people with medical and other disabilities: "Your medical and support care costs too much. By virtue of your disability, you have a poor quality of life. You suffer many indignities and struggles that leave you feeling worthless or a burden on others. You are largely invisible to the rest of society. You suffer a great deal physically, psychologically, in how your life is playing out. We can help you end your misery at a time of your choosing and in a comfortable and dignified way."

Ritualized death-making and people with significant disabilities are the essential ingredients for an old but still vibrant idea: eugenic euthanasia.

Eugenic Euthanasia

Eugenics started out as a fairly benevolent *what if?* In the 19th century, Mendel's genetic breakthroughs established that it was possible to predict characteristics of living things by selective breeding. It didn't take long to make the logical jump from Mendel's sweet peas to the genetic makeup of man, and the idea that it was possible to genetically breed better people, and, conversely, to "breed out" less desirable human qualities.

One faction of eugenicists stuck closely to the natural-selection idea, that nature itself would weed out defectives over time. Others took a more active position, suggesting that societies engage in "positive" eugenics—that is, that people with desirable traits be encouraged to procreate. It wasn't much of a stretch from positive eugenics to its opposite: that those with less desirable characteristics should be actively dissuaded from procreating, whether by propaganda, by law, or, even more actively, by widespread sterilization.

At that same time, killing via euthanasia was widely debated, for a simple reason: Sterilization itself only partially addressed the issue of ridding society of potential defectives because it did not address what to do with those defectives already inconveniently alive. Their very existence was an affront to the highbrow ideals of perfection and a "better society for all."

In *The Black Stork*,[1] Martin Pernick notes that the convergence of eugenics and euthanasia can be traced back as far as 1868, and that by 1890 national

debates on the killing of defectives were taking place both in the U.S. and in Europe. Newborns with disabilities were the first targeted, but soon the killing idea moved beyond infants. In Hungary, child-welfare pioneer Sigmund Engel demanded that "cripples, high-grade cretins, idiots, and children with gross deformities . . . should be quickly and painlessly destroyed [when] medical science indicates, beyond the possibility of a doubt that it is impossible for them ever to become useful members of society [or when] it is obvious that their existence is directly harmful to the species."[2]

Some people who should have known better went along with these suggestions. For example Alfred Nobel, the Swedish inventor, himself a man with a disability, acknowledged the appropriateness of infanticide, and that he himself should have been terminated. Nobel described himself as a "pitiful creature [who] ought to have been suffocated by a humane physician when he made his howling entrance into this life."[3]

Similar sentiments turned up in the United States. In 1899, Simeon Baldwin, a Yale law professor and incoming president of the American Social Sciences Association, used his presidential address to oppose surgery on newborns with disabilities if the "operation can only save the life by making it a daily and hopeless misery."[4] State legislators pressed home this idea. In 1903, Michigan state representative Link Rogers proposed a law to electrocute mentally defective infants. In 1906, both Ohio and Iowa saw similar legislative debates over proposed euthanasia laws, include killing "lunatics and idiots."[5]

Thus, for well over a century, eugenics and euthanasia have walked hand in hand. Currently, we see the results of eugenic euthanasia in the termination of Down syndrome and other pregnancies deemed genetically imperfect, the euthanasia of the elderly and medically disabled in Europe, and the increasing pressure to equate acceptable quality of life with human perfection.

The Propaganda of the Deed

Proponents of death-making have not gotten this far by accident. They are effectively persuading the unsuspecting public with an impressive combination of shock tactics, agitprop, and intolerance for dissent. In sum, they have shown great skill in using a powerful form of activist influence known as *the propaganda of the deed*: the execution of certain actions for their psychological effect on the group of people one is trying to persuade. Most often, it is used to force a previously hidden social taboo into the public eye, thereby shifting the parameters of the debate by in-your-face tactics meant to shock, disgust, and, most important, to desensitize the public to the point where the taboo action is tolerated and eventually accepted. The intent is to (a) get people's attention, (b) heighten their awareness of an issue, (c)

control the ensuing debate, and (d) by relentless public pressure, to force acceptance of the previously unacceptable.

Perhaps the prime examples of the propaganda of the deed in this debate were Jack Kevorkian's televised killing of Thomas Youk on CBS's *60 Minutes*[6] in 1998, and the judicial execution of Terri Schiavo in 2005.[7] In both instances, the taboo of suicide, assisted or otherwise, and especially in relation to persons with significant disabilities, was forcefully thrust from the shadows into the public consciousness.

Two prominent pro-death figures that are highly skilled in executing the propaganda of the deed are Baroness Mary Warnock and Professor Peter Singer.

Baroness Mary Warnock

In late 2008, Baroness Warnock, a former headmistress, commission chair, and perfectly sane woman, raised more than a few eyebrows with her comments on people's duty to die, as reported in the London *Telegraph*: "I'm absolutely, fully in agreement with the argument that if pain is insufferable, then someone should be given help to die, but I feel there's a wider argument, that if somebody absolutely, desperately wants to die because they're a burden to their family, or the state, then I think they too should be allowed to die. . . . There's nothing wrong with feeling you ought to do so for the sake of others as well as yourself. . . . I think that's the way the future will go, putting it rather brutally, you'd be licensing people to put others down."[8]

The breathtaking sweep of these statements is self-evident, their implications, on many levels, alarming. But Warnock has been saying these things for years. In December 1994, London's *Sunday Times* described her as "Britain's leading medical ethics expert. . . . [who has] suggested that the frail and elderly should consider suicide to stop them becoming a financial burden on their families and society."[9] The paper quoted Warnock as saying: "I know I'm not really allowed to say it, but one of the things that would motivate me [to die] is I couldn't bear hanging on and being such a burden on people. . . . In other contexts, sacrificing oneself for one's family would be considered good. I don't see what is so horrible about the motive of not wanting to be an increasing nuisance. . . . If I went into a nursing home it would be a terrible waste of money that my family could use far better."[10]

This is the same Baroness Warnock who previously made the case for parents being forced to pay for their infants' medical care, including for life-support equipment, if those infants were judged to have little to no chance of leading healthy lives. It's also the same Baroness Warnock who gladly endorses euthanasia and openly admits that the family doctor euthanized her

husband several years ago. I found the level of outrage over Lady Warnock's latest comments somewhat surprising. At least she's consistent: What she wants for everyone else she enthusiastically embraced for her husband. In this I find her more credible than Peter Singer.

Professor Peter Singer

Singer's chilly utilitarianism clumsily reveals his naked prejudice against people with disabilities. Essentially, Singer thinks people with disabilities have less value than people who do not have a disability, that their quality of life is not as high, and that their lives are not as fulfilling as those of their nondisabled counterparts. He finds it permissible for parents to judge whether, according to *their* criteria, their child with a disability should live or die. He does concede, though, that children with Down syndrome are lovable and can be happy. I suppose these children should be grateful.

Singer bases his arguments on the presupposition that "life is better without a disability than with one, and this is not itself a form of prejudice."[11] True, but it's not exactly a ringing endorsement either. Here's the way he views death-making of infants with disabilities: "We should certainly put very strict conditions on permissible infanticide; but these restrictions might owe more to the effects of infanticide on others than to the intrinsic wrongness of killing and an infant."[12]

In *Unsanctifying Human Life*,[13] Singer argues that under many circumstances, people are just like any other animals, and that basically we should therefore consider treating imperfect humans just aswe would imperfect animals. In this, at least, he's with Warnock and her ideas of "putting people down." But Singer, unlike Warnock, does not practice what he preaches. Several years ago, rather than euthanize his mother, who met all of *his own* criteria for doing so, Singer chose to spend significant amounts of money for her care until her natural death. Here's how he twisted out of it: "Well . . . it's probably not the best use you could make of my money. That is true. But it does provide employment for a number of people who find something worthwhile in what they're doing."[14]

Warnock and Singer are the progeny of the same predecessors, including the infamous Dr. Harry Haiselden.

Dr. Harry Haiselden

In 1915, at the German-American hospital in Chicago, Anna Bollinger delivered a seven-pound baby boy. Allan had multiple disabilities: no neck, one ear, and severe chest and shoulder deformities. His pupils were slow to react to light, he did not have a rectal opening, he had a blocked bowel, and

he had premature hardening of his skull and leg bones.

Haiselden, the hospital's eminent chief surgeon and an ardent eugenicist, knew that surgery could easily correct the blocked bowel and missing rectal opening. However, for Haiselden, Allan's other disabilities marked the infant for death. Haiselden recommended no surgery, and that the infant be left do die. Bowing to doctor power, the Bollingers agreed. Allan, naked, was moved to a bare room where Catherine Walsh, a family friend, found him: "Walsh had patted the infant lightly. Allan's eyes were open, and he waved his tiny fists at her. She kissed his forehead. 'I knew,' she recalled, 'if its mother got her eyes on it she would love it and never permit it to be left to die.'"[15]

Walsh summoned Haiselden, she later said, "to beg that the child be taken to his mother." Her pleas fell on deaf ears. Begging the doctor once more, Walsh appealed to Haiselden's humanity: "If the poor little darling has one chance in a thousand," she pleaded, "won't you operate and save it?" No, Haiselden laughed, because "I'm afraid it might get well."[16] Five days later, little Allan was dead.

In the early 1900s, euthanizing defective infants by withholding treatment was quite common; however, it was done quietly on hospital back wards. Haiselden realized that the time had come to force the issue into the open as a way of persuading the general public that eugenic euthanasia was not only acceptable, but even a considerate, loving act, and a civic responsibility. Quite the showman, Haiselden resorted to the propaganda of the deed to challenge, and then overpower, the taboo against the killing of newborns with severe medical and genetic disabilities. He succeeded.

The stories of little Allan and several other children who met the same fate exploded in the Chicago and national press. Haiselden was transformed into a cause célèbre overnight. The debate was furious, and, as would happen in Nazi Germany in the 1930s,[17] it spurred pleas from parents across the country for Haiselden to do the same to their children with disabilities. A father in Des Moines, Iowa, wrote Haiselden about his two-month-old whose mouth and jaw were severely misshapen. Contacted by the press, the father warned, "Unless someone does kill the baby, I'll have to." A mother in Baltimore, aware of Haiselden's views, was informed that her son needed triple amputation to save his life; she refused, commenting to the press that the child "should die rather than go through life a hopeless cripple."[18]

The furor Haiselden caused finally resulted in a medical board of inquiry, at which he was acquitted. Asked by reporters whether what he had done was eugenic, Haiselden answered swiftly and decisively: "Eugenics? Of course it's eugenics,"[19] he said. Over the next several years, Haiselden vigorously promoted what he was doing in the press. He gave interviews

incessantly, and was adept at co-opting props for his show: He frequently displayed dying infants to reporters and encouraged them to interview the still-hospitalized mothers. His propaganda of the deed convinced many; he had the very public support of the blind and deaf Helen Keller.

Haiselden's vigorous promotion of eugenic euthanasia culminated in perhaps the mother of all eugenic-propaganda films, *The Black Stork*. Often advertised as a "eugenic love story," it was later retitled *Are You Fit to Marry?* The film could still be found in movie theaters as late as 1942.[20]

Haiselden, now Warnock and Singer, among many others. How might we stem this propagandistic tide?

Addressing the Propaganda of the Deed

We face immense struggles in an increasingly pro-death culture—a culture that, for example, sees clandestinely putting people to death in parking lots, as Dignitas has done in Switzerland, as some sort of weird moral breakthrough. It's a culture that has spawned the horror of the Netherlands, where assisted suicide and euthanasia are available to just about anyone who asks for them (and for many who do not). We are also witnessing the growing specter of *Eutho-tourism*, where people travel abroad to die, to say nothing of the utilitarian beast of "futile care." Moreover, the pro-death message from the news media is well-nigh universal: The narratives are often tinged with admiration, if not outright adulation

The hallmark of the propaganda of the deed is effective communication, and that's where we need to fight. The world increasingly lives in cyberspace, on Facebook, YouTube, MySpace, and Twitter. The best thing about these new technologies? They're free. The death-makers are all over them; we need to be there too. Networking, crucial to any cause, is also a snap on the web thanks to free sites such as LinkedIn, a professional network site, and the Facebook and MySpace community and cause pages designed to link people with common interests across the globe. Many Facebook community or cause pages have several thousand people who are connected through mutual friends, and who share similar interests and views. We also need a much stronger presence in the blogosphere.

Reaching Critical Mass

For the two years leading up to the 2008 presidential election, the disability community had been incredibly frustrated that neither campaign seemed to be paying much attention to their issues. While both major parties had standard campaign language paying lip service to inclusiveness and so on, explicit talk of disability issues was missing. All that changed with the nomination speech

of Republican vice-presidential candidate Sarah Palin. Governor Palin, mother of a newborn with Down syndrome, and aunt to a nephew with autism, said: "In April, my husband Todd and I welcomed our littlest one into the world, a perfectly beautiful baby boy named Trig . . . and children with special needs inspire a special love. To the families of special-needs children all across this country, I have a message: For years, you sought to make America a more welcoming place for your sons and daughters. I pledge to you that if we are elected, you will have a friend and advocate in the White House."[26]

Palin's remarks represented advocacy for disability issues, but the disability community failed to welcome them; Palin was greeted instead with scorn or total silence. Her detractors scoffed that she was doing was nothing more than using her son as a prop for political gain, and recited long histories of how the Republican party consistently cut funds to disability support programs.

It was a missed opportunity, one we could have used to make disability issues more visible to the general public. And it suggested why we in the disability community are not better opponents of eugenic euthanasia and assisted suicide: We are a fractured and relatively undisciplined movement. Just as Palin's disability advocacy got derailed by partisanship, our opposition to the pro-death forces gets sidetracked in tangential issues that prevent us from being as effective as we could be. For example, we oppose assisted suicide and euthanasia, but only when the people sharing our view agree with us on other political issues as well. This means we often spend massive amounts of energy on factions and intrigues that divide and weaken us.

It is time to change.

In this take-no-prisoners battle, opposing the evil of assisted suicide and euthanasia must be the *sole, incontrovertible criterion* on which we stand. And here's why: Assisted suicide and eugenic euthanasia are evils that strike at the very heart of human life. They are equal-opportunity evils, transcending social class, gender, cultural background, and levels of education and income.

Let me conclude with a few suggestions.

First, we must seize the propaganda of the deed for our good revolution. Why should it be the exclusive province of the death-makers? We must set out with more firmness on the course implied by our convictions. We must seize anew, and with vigor, the opportunity to spread our message—via new technology, and with undivided loyalties.

Second, we must stand shoulder to shoulder, out there where millions of people can see us, and declare that we are the solid and united counterweight to assisted suicide and eugenic euthanasia, especially as it relates to people with disabilities. We are male, female, agnostic, Christian, Muslim, Jew, and

Buddhist. We are conservative, liberal, anarchist, pacifist. We are an exact replica of the world in which we live.

We must consistently and unfailingly refuse to be dissuaded from our central rallying position—that assisted suicide and eugenic euthanasia must be stopped, that living is a better alternative than the lie of a "dignified, good death," and we must articulate why it is morally, logically, and ethically wrong to devalue the most vulnerable among us.

We must do these things because hundreds of thousands of the vulnerable, the infirm, and the disabled cry out for our unity. They seek comfort and sanity. They are weak. They are sick. They are dying. They are human beings. They are of infinite value.

They deserve nothing but our best effort, because, in the end, they are us.

NOTES

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16. Ibid., 252.
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Sexuality, Rights, and the Disabled

Jo McGowan

Of all the issues confronting people with disabilities, sexuality is perhaps the most charged. A recent case in India brought many of the most compelling strands of this complex tapestry together, and—after protracted and unseemly wrangling among disability activists, human-rights advocates, and a series of inept and embarrassed government officials—it looked like it would take the Supreme Court to settle it.

The Supreme Court did make a decision, but that decision raised more questions than it answered, and left the issue not only far from settled, but even more complicated.

The case involved a young woman with a mental handicap. She had been brought up in a government institution as a ward of the state and had been raped repeatedly by two guards there. At 19, after several years of abuse, she became pregnant. When her condition was detected, the officials in the institution determined that she should have an abortion. All would have proceeded unquestioned, but for one surprising twist.

The woman said that she wanted to keep the child.

Apparently, she didn't just say it, she insisted. And her insistence was so vocal and so sustained that someone actually listened to her. This is, in some ways, the most surprising part of the whole story: In India, listening to a child (at 19, that's what she was considered to be) or a person with a disability is strictly optional.

So now things were complicated. Had no one taken an interest, the institution officials would most likely have gone ahead with the abortion, even against the woman's wishes. They were clearly guilty of negligence in her care—two of the institution's staff had been raping her for years—and obviously would have been eager to destroy the "evidence."

But neither the woman in question nor the woman taking an interest were to be easily turned away.

As compromise seemed unlikely, the matter went to the state High Court of Punjab, where the woman lived, and the arguments the government made were logical and dispassionate:

1. The woman was mentally handicapped and could not be expected to look after her own child. Since the state would be responsible for the child,

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it had a compelling interest in not allowing the pregnancy to continue.

2. The woman's disability might result in a disabled child.

3. The woman had been raped and should not be expected to carry the child to term.

4. The woman had no idea what she was in for, either in terms of the pregnancy and the birth, or of the reality of bringing up a child.

The High Court judge agreed. In an astonishing judgment, he ordered that the woman be *compelled* to have the abortion, her own objections notwithstanding. For India, which prides itself on being a democracy, this was a shocking turn of events.

Yet public opinion was still sharply divided on what should be done next. Many human-rights activists weighed in on the side of getting the abortion done, arguing that not doing so unfairly and inhumanely forced a woman to undergo an experience she had not asked for and for which she was ill-prepared. They argued that the baby would necessarily be brought up by the state in the same sort of institution that had allowed the rape to occur in the first place and that this would be unconscionable.

On the other hand, disability activists argued that the assumptions being made about the woman's awareness and abilities were unfair, biased, and ignorant. They pointed out that intellect and academic achievement are no guarantee of good parenting skills and that other mothers are not subjected to arbitrary fitness tests before being allowed to give birth. They also warned that attaching such conditions to pregnancy and birth surely endangered basic human rights for every Indian, not just for those with disabilities.

Tanu Bedi, a young lawyer and self-appointed advocate for the woman, filed an appeal in the Supreme Court, where a speedy verdict was rendered: No woman, even one with a mental handicap, can be compelled to have an abortion.

While pro-lifers welcomed the decision, it was actually not a victory for the cause in any true sense, except that this one child's life was spared. Indeed, almost nowhere, in all of the dozens of articles, blogs, and Facebook debates that took place on this issue, was the child's right to life even mentioned, let alone championed.

Similarly, many other important issues which the case highlights have also been ignored or have not been analyzed with the required level of seriousness:

A disabled woman was raped. People with mental handicaps are statistically more likely to be sexually abused. They are accustomed to being dependent on adults for many of their basic personal needs and are generally submissive in their response to them.

People with developmental disabilities may lack the social skills to assess a dangerous situation and the judgment to get out of it or raise an alarm. They are also exposed to more "caregivers" than typically developing people. The more people one is intimately involved with, the higher the chance that one of them will be an exploiter.

The woman became pregnant. People with developmental disability are often assumed, particularly in India, to be both asexual and infertile. While some disabilities do have an associated infertility component (only around 50 percent of women with Down Syndrome, for example, are fertile), most otherwise-healthy adults have the same chance of being able to reproduce as anyone and many have the same sex drive as typically developing people.

The baby could be born with a disability. Many opponents of the Supreme Court decision hinted darkly that this was likely, albeit with almost no evidence to support their claim. But what if it were true? Disability is, I believe, "the last frontier" in the battle against discrimination and injustice. While people are indeed denied basic human rights for all sorts of reasons all over the world, no civilized person ever tries to justify it (leaving aside abortion, of course). When women are raped, when prisoners are tortured, when children are abused, when war crimes are committed, the civilized world recoils in horror. We speak out against human-rights violations wherever we see them and so we should and so we must.

Except when it comes to people with disabilities.

Abortion of girls because they are girls is called what it is: murder, brutality, feticide. Abortion of babies with disabilities is routine, sanctioned, and—worse—*expected*. Here in the United States, it is estimated that 95 percent of babies detected with Down Syndrome are aborted. Women who elect to have their babies anyway are made to feel irresponsible and reckless, and encouraged to believe that they are unfairly burdening society.

Eminent philosophers (Dr. Peter Singer of Princeton is one example) speak openly of the moral right of parents to abort handicapped babies before they are born, and afterwards too. At the moment, it is acceptable only in early infancy, before parents have gotten "attached" (the concern is for the parents' feelings rather than the baby's life). But as ethicists admit, if it is acceptable to abort a disabled baby before birth, what is really wrong with doing it later?

We are well down the slippery slope.

Sexuality offers a prism through which we can better understand ourselves, the people around us, and the values we hold most dear. When we use it to look at disability we find, to our dismay, we are not the people we thought we were. Although we speak of tolerance and diversity, many of us

are uncomfortable with people with disabilities making choices in their lives, distressed by the idea of their having sexual relationships, and appalled that they might bring more people like themselves into the world.

This woman's pregnancy was ordered to be terminated by the High Court, in spite of her insistence that she wanted the baby. Here we come close to the heart of the issue. Can a person with an intellectual disability make a decision? Is intellectual capacity required for parenthood? Is the state ever justified in forcing someone to undergo an invasive procedure, particularly one so fraught with moral implications?

Many who agreed with the court's decision that the woman be allowed to give birth to her child nonetheless believed the baby would have to be taken from the mother and reared by the state. It's important to look carefully at biases and assumptions here.

Are we sure that a woman with a cognitive disability is incapable of taking care of her child? In theory there is no reason to assume she couldn't manage, albeit with support. Most able women need support to bring up their babies. Motherhood is one of the most demanding tasks there is and a high IQ may be one of the least important prerequisites for accomplishing it. As long as the mother is loving and attentive, as many mentally handicapped women are, and, crucially, has support from the community, a baby could prosper in her care.

Granted, that baby might not get the perfect intellectual environment, but is academic success the only goal in life? Does it guarantee happiness? A child brought up by a mother with intellectual impairment might still be deeply loved and cared for and might be satisfied and content—not things to be lightly discarded.

In spite of such logic, arguments were made about the state's compelling interest in seeing that this child not be born. Because the baby would have to be brought up by the state, better not to allow it to be born in the first place. This reasoning is both specious and dangerous.

Many people who are not wards of the state might still be judged incompetent to bring up children. The socialite more interested in parties than in a baby's needs, the workaholic whose ambition supersedes her parenting responsibilities, the habitual drinker, the poor woman living hand to mouth, the child bride, the unwed mother—the list goes on.

Are we prepared to terminate the pregnancies of such women? The Indian Supreme Court said no. Human rights cannot be granted to some people and denied to others without ensuring that eventually they will be denied to all.

The last frontier. It's later than we think.

Eugenics Triumphant in Prenatal Testing

Mary Meehan

Part II: The Resistance

The first part of this series described the deep influence eugenics—the effort to breed a better human race—had in encouraging prenatal testing and eugenic abortion. It explained the major roles of the American Eugenics Society, the American Society of Human Genetics, and the March of Dimes in spreading the deadly combination. Part II will show how the U.S. government has funded and promoted prenatal testing and counseling. It will describe how the testing/abortion combination has made pregnancy an ordeal for many women and couples. It will report resistance to the eugenics program and suggest how that resistance might become stronger.

The Heavy Hand of Government

In the 1960s, there was great interest in genetics at a major government agency, the National Institutes of Health. But Rep. John Fogarty (D-R.I.), a key congressional supporter of NIH, was bothered by some 1963 discussion about preventing births of handicapped children. "That is what Hitler was trying to do, was he not?" Fogarty asked. After the congressman's sudden death by heart attack several years later, President Lyndon Johnson named NIH's Fogarty International Center in his honor.[1] The Center, ironically, sponsored a 1970 conference on prenatal testing that defied Fogarty's warning.

Government agencies quietly had funded research on prenatal testing in the 1960s; but the 1970 conference signaled a major push for it.[2] Eugenicists and some of their fellow travelers from both the U.S. and England were there. One eugenicist chaired the conference, and others gave major talks.[3]

Amniocentesis was the main method then used for prenatal testing. It's an invasive procedure in which a doctor pushes a needle through a woman's abdomen and into her uterus to withdraw amniotic fluid for analysis. The test itself causes anxiety. When followed by eugenic abortion, it has devastating effects on many couples—especially on the women. Yet of the 58 participants in the 1970 NIH conference, only three were women. Participants barely mentioned the psychological effects of eugenic abortion. Discussion of ethics was limited and heavily weighted toward the eugenics side. The fix was in.

Abortion was still illegal in most states, for most reasons, when the

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conference took place. But eight years before, the American Law Institute had proposed that states allow abortion when there is substantial risk of grave fetal defects. Eleven states allowed this by the time of the NIH conference. Denmark's similar provision for eugenic abortion, dating back several decades, had enabled research on prenatal testing in the 1950s and '60s. In the U.S., changes in state laws now offered more research subjects.[4]

Kurt Hirschhorn, a leading geneticist, told the NIH conference about his laboratory's work on prenatal testing in pregnancies "that were going to be terminated for other reasons." Ironically, in his youth the Austrian-born Hirschhorn had fled the Nazis, who also did experiments on humans destined to be "terminated for other reasons." After Hirschhorn finished medical school and some postgraduate work in the U.S., the American Eugenics Society recommended him for a medical-genetics fellowship. That enabled him to study genetics in Sweden and to write an article about Western European genetics for a 1958 issue of *Eugenics Quarterly*.

In a 1993 interview, though, he said he was not a member of the eugenics group. To the suggestion that experience as a refugee from the Nazis should have made him "very anti-eugenics," Hirschhorn responded, "Oh, I'm not for eugenics at all" and denied that prenatal testing is one form of it. He said that "you've got to differentiate between genetic manipulation of populations as opposed to helping a particular family with a particular problem."[5] Many others make this argument, but it does not stand up historically. As early as 1940, eugenics leader Maurice Bigelow called for primary emphasis on "family eugenics." And in 1972 Hirschhorn himself referred to abortion for disability, at the family level, as "negative eugenics."[6]

Other refugees from the Nazis who played a role in American eugenics included geneticists Franz Kallmann, Arno Motulsky, and Curt Stern and medical statistician Christopher Tietze.[7] While they rejected the ethnic and racial bigotry of eugenics, they accepted its bias against people with disabilities. This contradictory attitude is still widespread today.

Of the icy hearts at the 1970 NIH conference, some seemed frozen right through. Amniocentesis at times causes miscarriage of a child who is not disabled. But one participant remarked, "I don't think we should be overwhelmingly concerned about aborting a normal fetus. For social reasons this is going to be done more and more commonly." Another participant suggested aborting not only affected children but also *carriers* of some harmful genes. Still another said this could be done "for generation after generation."[8]

Leon Kass, an M.D. with a special interest in ethics, was alone when he asked, "Are there suboptimal babies? Will they get suboptimal rights? . . .

Doesn't society rest on the presupposition of equal respect for all human life?" But a high-ranking NIH official, Robert Berliner, remarked that NIH had avoided "overly rigid positions" on medical ethics. "We believe," he added, that ethics policy must be "developed by the very people charged with carrying it out—clinicians, investigators, and their colleagues—and not by administrators in Washington."[9]

How the Government Manipulates Its Citizens

As NIH revved up funding of prenatal-testing research, a committee linked to the National Academy of Sciences studied how to institutionalize genetic screening in medical practice. (Although technically private, the Academy is the federal government's official adviser on science and technology.) The committee produced a book on genetic screening that included the question, "*Can Behavior Be Modified without a Direct Attack on Motives and Beliefs*?" Yes, the committee said, it's possible to persuade people to act "rather independently of their belief systems." The key lies in "structuring of the environment" by law and/or having something accepted as part of regular medical practice. The committee found it "interesting and encouraging" that change in behavior often leads to change in beliefs. It piously added that trying to change behavior without changing its psychological basis "may not always be ethical" and then suggested working on both components. To draw more people to genetic screening, it said, "A spokesman should be chosen who is likely to be believed by the intended audience." That person "should be seen as knowledgeable, unbiased, likable, noncontroversial, similar to the audience in some respects, and having the best interest of the audience at heart." The committee added: "For one group, a black physician might be an ideal spokesman; for another, a schoolteacher; for another, a mother of a child with Down's syndrome; and so on."[10] Down the road, this approach would help produce great victories for eugenics.

Meanwhile, supporters of prenatal testing "structured the environment" by making the testing a part of routine obstetrical practice. After *Roe* v. *Wade*, state courts helped achieve this by making large financial awards in "wrongful birth" cases. They made the awards to parents who had not been offered prenatal tests that—if used in combination with abortion—could have prevented the births of their handicapped children. Such awards put heavy financial pressure on obstetricians. To that stick for doctors, insurance companies added a carrot for parents by covering costs of the testing and abortions.[11]

Margery Shaw, a geneticist who held both medical and legal degrees, was a strong supporter of wrongful-birth cases. In 1977 she wrote that "we are

witnessing a neo-eugenics movement." She had good reason to know this, since she was on the 1974 membership list of the Society for the Study of Social Biology. That's the old American Eugenics Society, sailing under its newer and more respectable flag. (The old pirate crew had hauled down its skull-and-crossbones banner and hoisted, instead, a bland and boring one.) Shaw suggested it was "only a matter of time" until doctors would be required to offer amniocentesis to pregnant women.

State-court awards for "wrongful birth" had accomplished that in large measure when Shaw addressed the issue again in 1984. In her earlier article, she had referred to "defective children" and "mental defectives," but this time she argued for eugenic abortion as a *benefit* for such children. From the child's viewpoint, she wrote, "a rational argument can be made that non-existence is preferable to existence filled with incapacities and suffering." Society, she said, "should decide to wipe out muscular dystrophy, Tay-Sachs disease, cystic fibrosis, and sickle cell anemia."[12] But that meant wiping out unborn children who had those diseases.

Meanwhile, government support for prenatal testing had grown steadily after Sen. Edward Kennedy (D-Mass.) led a successful effort to pass the 1976 Genetic Diseases Act. Kennedy aide W. Carey Parker, a geneticist and an attorney, had shown the eugenics orientation so widespread in genetics in a 1970 article for *Birth Defects*. Writing when abortion was still illegal in most states, and when prenatal testing was not fully developed, Parker said that "the possible birth of a defective child" was something that could "produce drastic and irreversible effects" on a family. Then he predicted: "Once the certainty of a seriously defective fetus can be determined, once the information provided by genetics is more complete, there will inevitably be pressure on the states to ease their abortion laws to accommodate such cases."[13]

After *Roe* v. *Wade* cleared the way, Senator Kennedy and others put the 1976 genetics law through Congress as part of a larger health bill. It involved the federal government deeply in promotion of genetic testing. The 1975 Senate hearing on the bill included testimony from three geneticists who were, or later would be, associated with the renamed American Eugenics Society: Margery Shaw, Arno Motulsky, and Michael Kaback. Either during the hearing or in formal statements submitted for it, Motulsky, Kaback, and others specifically referred to prenatal testing.[14] But floor debates were vague, and the final bill provided support for "genetic testing and counseling"—not excluding prenatal testing yet not mentioning it specifically, either.[15] Many members of Congress probably didn't realize that prenatal testing would be covered and that it was closely linked to abortion. Advocates of the bill kept

the debates vague because abortion was then, as now, an extremely divisive issue in Congress. (Most Senate members supported it then, while most House members opposed it.) As Beverly Rollnick wrote in her doctoral dissertation on the bill, two key staff members "avoided any overt or covert reference to any social or eugenic issues during the legislative process," since they "did not want to alarm the anti-abortion lobby." One of them "deliberately kept the screening language in the House bill as general as possible to provide flexibility." The stealth strategy worked. Looking to the future, Rollnick remarked: "The brave new world may arrive unheralded, taken for granted as part of routine medical care."[16]

The 1976 genetics law authorized aid to states for genetic-testing services. By now, many states have encouraged prenatal testing for decades. Combined with pressures from state courts and the private medical establishment, this has institutionalized eugenics in a profound way. When testing indicates Down syndrome or anencephaly, abortion rates soar to 80-90 percent or even higher.[17]

California has a notably vigorous screening program. Years ago, a doctor who led it presented eugenic abortion as a way to reduce the cost of medical care. According to a 1986 report, the doctor "estimates that if 90 percent of women found to be carrying severely malformed babies choose abortions, $13.3 million will be saved statewide in lifetime medical costs for every 100,000 women screened." California also has a Birth Defects Monitoring Program. A 1995 study, based largely on data from that program, estimated the extra lifetime cost of someone with Down syndrome at $451,000.[18]

Why, one might ask, doesn't anyone calculate the extra lifetime cost of eugenicists? Or of their many supporters in the American establishment? We could count their high salaries, the palatial homes and upscale cars that some have, luxury vacations abroad, and so on. And let's not forget their medical costs: Some may need expensive medical care, possibly on several different occasions. Perhaps each of them costs far more than someone with Down Syndrome. Or perhaps we shouldn't reduce human life to cost estimates. In the "Peanuts" comic strip, Charlie Brown's little sister once exclaimed that Snoopy "is more trouble than he's worth!" And Charlie Brown replied, "Most of us are."[19]

The Ordeal that Couples Face

The early use of prenatal testing, to treat Rh blood incompatibility, was truly therapeutic. Some use still is therapeutic in intent and result; and if all of it were, there would be universal praise for it. But the testing would be far more limited than it is today. It would not involve screening nearly all pregnant

women, and it would not be the search-and-destroy mission that it has become.

Since the early days of eugenic testing, many couples have gone through ordeals of anxiety and dread. Enticed or pressured to have the testing as part of routine care, many suddenly find themselves torn between eugenics and their own ethical convictions. Those who are told their babies have serious handicaps, and who decide to abort them, suffer grief and often much guilt as well. Advocates of prenatal testing have known this for decades.[20] Yet they have not questioned the whole eugenics enterprise, nor felt guilty about the misery they have caused. Instead, they have developed *more* screening, such as the alpha feto-protein (AFP) test and chorionic villus sampling (CVS). Now many women undergo a whole battery of tests, sometimes over a long stretch of pregnancy. Many, finding that their children have disabilities, undergo abortion when they can feel their babies' movements—a timing that intensifies suffering.

Some women and couples acknowledge the suffering, but say they are glad they have the choice. It enables them, they say, to have healthy children later. Some even abort for relatively minor problems such as cleft lip. Whether for major or minor concerns, they accept the eugenics rationale. Genetics counselors and their colleagues in medicine encourage such acceptance by treating post-abortive couples as bereaved parents who are grieving a natural death. They offer parents a chance to hold the baby after abortion (if intact) and to have photographs taken for keepsakes. They may arrange baptisms and suggest funeral services.[21] It is as though no one—not the parents, nor the abortionist, nor those who brought them together—ever made a conscious decision to kill the child.

It's doubtful, though, that grief counseling and the pretense of natural death can alleviate all the suffering. And they do nothing to relieve the stress of the testing itself. Abby Lippman, a noted feminist professor at Canada's McGill University, once wrote that "deciding for or against testing makes many women feel they will be making a terrible mistake regardless of the path chosen." Advocates claim that tests usually relieve parental anxiety by ruling out Down syndrome or another disability. But Lippman suggested this is a matter of "tranquilizing women who have first been made fearful."[22] Two other scholars said their research suggested that "over the entire pregnancy, amniocentesis may heighten rather than reduce anxiety" and that for some it "unleashed terrors that previously had been absent or suppressed."[23]

Some couples go through a roller coaster of emotion with unclear results, retesting, and another agonized wait for information. Many face an obstacle course in which they clear one disease hurdle only to be confronted with

others. Sometimes, too, the experts are wrong. Researcher Robin Gregg described one mother who went through a battery of tests, none of which indicated any problem with her unborn child. Yet the little boy had such severe problems that he died when only 16 days old. His mother "felt betrayed."[24] There are mistakes in the other direction, too, sometimes revealed when parents decline abortion despite dire predictions based on testing. After ultrasound, one woman was told her child might have Down syndrome and that his "stomach was outside of his body." A short time later the experts "added the possibility of toxoplasmosis, and water on the brain." Still later, there was a diagnosis of dwarfism. All of the warnings and predictions were wrong; and 18 months after birth, the little boy was doing very well.[25]

Writing in the *New York Times*, Natalie Angier described her ordeal when she was told that her unborn daughter had a "clubfoot." She and her husband didn't know the particulars of that disability. "The term was so thuddingly ugly and Dickensian," Angier wrote, "that we could not help imagining the condition must be ugly and severe." But while it often requires minor surgery to lengthen the Achilles tendon, it can be corrected mainly by casting and splinting. Angier spoke to women whose children had the condition and was encouraged by what she heard. In the end, though, her daughter was born "with a lusty set of lungs, a full head of black hair—and no clubfoot at all." Why the misdiagnosis? Angier said her own feet are "unusually supple" and that her daughter may have inherited that trait. She added: "Perhaps my daughter was dreaming that she was a ballerina, flexing her foot into *en pointe* position, and preparing to dance the dance." Angier realized she was fortunate, yet her experience made her wonder: "How perfect must a person be to deserve health insurance, a job, a parent's love, or life itself?"[26]

Sometimes the experts say a child will be "born dying" because of anencephaly or another lethal condition, and they suggest abortion for that reason. In the old days, a couple didn't know their child would die soon after birth, so they didn't face months of dread. Nor did they face the guilt many now have after eugenic abortion. One woman chose abortion to prevent suffering for her child, who had a lethal kidney condition. Later, though, she said, "There are times that I really curse modern technology. No one should have to make these kinds of decisions." Another woman received a bad diagnosis, but did not have an abortion; her child was stillborn several months later. "The only time our son lived was inside me," she said, "and we lost all joy in that for the last four months. If we were to have a disabled child we have the rest of our lives to get used to it—why start before you can even hold them?"[27]

One woman said a baby with Down syndrome "can live to a mature age,

and have a rather good life, so there's a tremendous amount of guilt involved—that you're getting rid of it because it is not a perfect human being." Another, after an abortion for Down syndrome, reported that the "first few months were really horrible." Guilty and depressed, she didn't "want to talk to anybody, didn't want to move, really didn't want to do anything."[28] And a man whose daughter was aborted for "a brain anomaly which included seizures and clenched fists" later said, "I let the doctors kill my daughter via a huge needle, a shot to the heart through my wife's belly as she lay sedated. . . . The grief is unbearable sometimes. Does the fact that I murdered my daughter show on my face?"[29]

There has not been much research about the effects of eugenic abortion on other children in the family. In the early days of prenatal testing, though, psychiatrist Richard Restak reported a story that should have been a warning to many: "In Washington, D.C., the mother of a mentally retarded son visited a genetic counseling unit for amniocentesis when she became pregnant again, for she and her husband were anxious to prevent the birth of another genetically abnormal child. Upon returning home she found her retarded son hiding in a closet. Over the next few days he had trouble sleeping because of nightmares that someone was trying to hurt him."[30]

How do adults with disabilities feel when they learn that their parents might have aborted them? Ashley Wolfe, a young woman with Down syndrome, had done some college work, acting, and public speaking when she had a conversation with her parents about this. Her mother said she didn't know "what I would have done" had she known in advance about the Down syndrome; she added that "I would never judge anyone who makes that choice, either way." And her father remarked, "There's every possibility that we would have elected to have an abortion." Ashley gamely replied that, with abortion, "You're ending a life. That is the fear, the insecurity of a person taking over. There are obstacles in life and you get through it."[31] I would guess that, despite her brave response, her parents' comments hurt her deeply.

Three Sources of Resistance

When the Declaration of Independence speaks of our right to life, it does not exclude unborn children, people with disabilities, or any other group. The right-to-life movement, in harmony with the Declaration, believes that government has an obligation to uphold the right to life on an equal basis.

Most movement activists believe this right is a gift from God. Here, too, they are in harmony with the Declaration, which says that humans are "endowed by their Creator" with the unalienable right to life. Yet atheists

such as Nat Hentoff believe in the right to life and apply it to abortion. Queried about this once by a priest, Hentoff recalled, "I told him that it's a lot easier for an atheist—at least, this atheist—to be against abortion because all I have is life, this life. All I can believe in is life."[32] Dr. Bernard Nathanson, an atheist when he turned against abortion, based his position on the ancient Golden Rule, "Do unto others as you would have them do unto you." Nathanson said this is not a sectarian doctrine, but "simply a statement of innate human wisdom." He added: "Unless this principle is cherished by a society and widely honored by its individual members, the end result is anarchy and the violent dissolution of the society. This is why life is always an overriding value in the great ethical systems of world history."[33]

Right-to-lifers are alarmed when government, instead of defending life, authorizes the killing of one or more classes of people. Thus in 1959, when the American Law Institute debated a recommendation to permit eugenic and some other abortions, attorney Eugene Quay told his colleagues: "The state cannot give the authority to perform an abortion because it does not have the authority itself. Those lives are human lives, and are not the property of the state."[34]

Novelist Pearl Buck explained why she would not have wanted an abortion had she known in advance that one of her daughters would be profoundly retarded. "I fear the power of choice over life or death at human hands," she wrote. "I see no human being whom I could ever trust with such power—not myself, not any other. Human wisdom, human integrity are not great enough."[35] British writer and parliament member Norman St. John-Stevas, countering the idea that a handicapped baby may be better off dead, declared: "No human being has the right to make any such judgment about another human being. Even if one had the right, there would be no guarantee of making a correct decision."[36] And feminist pro-lifer Cecilia Voss Koch noted that "every time we cheapen someone else's life, we cheapen our own and place it in jeopardy. Not one of us knows when she will be helpless—completely dependent on the whim of some powerful arbiter."[37]

There are also feminists who support legal abortion, yet discourage eugenic use of it. Sociologist Barbara Katz Rothman, epidemiology professor Abby Lippman, and biologist Ruth Hubbard are in this group. Rothman's 1986 book, *The Tentative Pregnancy*, quoted many women about the sheer misery they experienced in testing and eugenic abortion. She questioned how much choice women have when they face social and medical pressures to abort for handicap. With fine irony, she said that "for those who want what the society wants them to want, the experience of choice is very real."[38]

Abby Lippman once said she was not trying "to limit women's options."

But she declared that prenatal testing "allows geneticists and their obstetrician colleagues to impose a 'choice' for abortion covertly, if not overtly, when they decide which fetuses are healthy, what defines healthy, and who should be born." Lippman proposed public funding "for home visitors, respite care, and domestic alterations" to help with major childhood health problems—whether congenital or occurring later. This, she suggested, would provide the type of reassurance women really need.[39]

Ruth Hubbard, biology professor emerita at Harvard, is a veteran critic of over-emphasis on genetics in health care. In *Exploding the Gene Myth*, she decried prejudice against people with genetic disease. She noted that songwriter Woody Guthrie, "who died of Huntington disease, lived a productive life and left a legacy of over a thousand wonderful songs." Woody's son Arlo, she added, did not want to be tested for the late-onset disease: "As all of us die sooner or later, he feels that the point is to contribute to society while we live, rather than worry about when death will come, or from what cause." She also remarked that "all of us can expect to experience disabilities—if not now, then some time before we die, if not our own, then those of someone close to us. If only for our own good, we must dispel the dread of disability that motivates such pervasive prejudices, and so limits the lives of many people."[40]

Despite these excellent comments, Hubbard still "unequivocally" supported a right to abortion for any reason. In an earlier article, she had said women need this right "precisely because it is a decision about our bodies and about the way we will spend our lives." Then she added: "But it should not become a decision about someone else's life. Arguments regarding the 'quality of life' of the future child are off the mark."[41]

Hubbard was born in Austria. When she was in her teens, she and her family fled the Nazis and found refuge in the United States.[42] While she is keenly aware of Nazi eugenics, perhaps she has not reflected enough on the fact that the Nazis used abortion as one tool of eugenics—and reserved it for their *enemies*. They were pro-abortion when it prevented the births of Jews, Slavs, and people with genetic disease. They banned abortion for Germans, not because they respected human life, but because they wanted to expand the German population for eugenic and political reasons.[43]

The disability-rights movement should be a major source of resistance to abortion for disability. And, indeed, some disability-rights activists are also strong pro-lifers: Lillibeth Navarro and Mary Jane Owen, for example. Others, though, are feminists who support legal abortion but are conflicted over its eugenic use. When bioethics groups discuss prenatal testing, they often feature such feminists as speakers or writers. Adrienne Asch, who is blind, is one of

their favorite presenters. While she makes good criticisms of prenatal testing, her bottom line is that parents should be free to choose abortion for any reason.[44]

Alison Davis, a feminist and disability-rights activist in England, used to support legal abortion, but began to change her mind after reading about the infanticide of a baby girl who had spina bifida. A doctor had sedated the little girl, Davis said, so that "she was too sleepy to cry for food, and thus starved to death." Davis uses a wheelchair because she, too, has spina bifida. The baby, if allowed to live, would "have been exactly as disabled as I am myself." Davis didn't change her views overnight, though. She reached an intermediate position: that women have a right to abortion, but not to "a selective, discriminatory" one. Finally, though, she realized this meant that disabled people "should have more rights than anyone else," since only unborn children who were handicapped would have protection from abortion. She understood that "if I wanted equal rights for me and those like me, I could not in turn deny them to the unborn."[45] Feminists who support abortion should ponder Davis's conclusion. Meanwhile, though, we should cheer them every time they land a solid blow against the manipulation and misery of prenatal testing.

Making Resistance More Effective

Congress passed a law in 2008 to improve information and support for parents who find, before or after birth, that their children have handicaps. The law authorizes a telephone hotline for parents; expansion of a government information center on childhood disabilities; expansion of peer-support programs for parents; a registry of families who are willing to adopt children with handicaps; and "awareness and education programs" for health-care professionals. Sen. Sam Brownback (R-Kan.) was the chief sponsor and promoter of the law, and the late Senator Kennedy cosponsored it.[46] If well-funded and well-administered, it may prove to be a major step forward.

Yet the new law does not directly challenge eugenic testing and abortion for disability. Congress has not come close to slaying the monster it helped create. We need a complete exposé of government promotion of eugenics—and a campaign to roll back eugenic laws and court decisions. That is a tall order, yet it can begin with a simple step: confronting the false history that leads many to believe that the eugenics movement died with the Nazi regime in Germany, or that U.S. eugenicists developed a "reform eugenics" after World War II—a kinder, gentler eugenics that really harms no one. Eugenics in the U.S. and Europe merely paused for a short time after the war, then roared back with a huge and successful campaign for population control.

That was—and still is—aimed primarily at poor people and minorities, at home and abroad.[47] Eugenicists drove prenatal testing and "selective" abortion on a parallel track of their railroad in order to prevent the births of people with disabilities. There is abundant evidence on these points. But there is also a great need to get that evidence into the mainstream media.

A second step is to challenge politicians who support eugenics. We must make them come out from behind their euphemisms and defend what they support—or give it up. It's a fair guess that many politicians will not want to defend the current system of prenatal testing once they understand its strong links with organized eugenics. But much educational work with politicians is needed. Its practical focus should be a demand to end government subsidy of the testing/counseling/manipulation/pressure regime. Instead, we should use the money to deal with environmental causes of disability, including nutrition problems. Folic-acid supplements, for example, are making a dramatic improvement in prevention of spina bifida and anencephaly.[48]

We must show how the current, eugenic regime undermines government laws and programs that disability-rights activists have won over the past 35 years. And those laws and programs should be studied to see how effective they are and where change is needed. Employment, for instance, is still a major problem for people with disabilities. Many have benefited greatly from early intervention and special education, yet still can't find the jobs they need when they finish school.[49]

A third step is to challenge health-care professionals to face their own contradictions—that is, to make a decision between the "First, do no harm" principle of medicine and the "throw the disabled to the wolves" mentality of eugenics. The two approaches cannot be reconciled. With the prenatal-testing/abortion combination, eugenicists and their co-workers *have institutionalized homicide as medical practice.* Now they are trying to do the same thing with euthanasia. These issues are deeply involved in current battles over health care in the U.S., so it's important to put eugenics front and center in the debate. We must force eugenicists to come out from behind their camouflage and defend—if they can—what they actually are doing.

There is also a need for ever-stronger resistance to eugenics from people who have disabilities and from their relatives and friends. There are some fine examples to follow. Barbara Sieger, a Feminist for Life activist in Wisconsin, referred to her spina bifida when she testified before state legislators years ago. She emphasized the joy of life and the way people with disabilities share it: "Please take a good look at me, not at the cosmetic of the non-handicapped, but at the beauty of God's creative love, a human being with emotions and feelings. Children, not blinded by society's

prejudices, love me. Friends share experiences of their daily lives, including joys, sorrows and pains, and we celebrate the joy of life's experiences together. I feel the warmth of a gentle sun, and a rose brushed up against my cheek is as velvet to the touch to me as it is to you."[50]

Leonard Sawisch, a dwarf who has a Ph.D. in psychology, explains his perspective on disability with anecdotes and wit. In one talk, he recalled that when he was a new father and referred to his children, "Invariably, someone would sheepishly ask, 'Are your kids small, too?' and I would respond, 'So far!'" But he also highlighted the contradiction of mainstreaming people with disabilities and, at the same time, trying to prevent the births of more such people. He added that some suggest "that if we are born, we should not be allowed to live. Which way is it to be? On the one hand, I should participate fully in society; on the other hand, I should not be here."[51]

Anya Souza and Kathy Gilbert, two women with Down syndrome, were leaders of a protest against a Down syndrome screening conference in London several years ago. The protest received enough attention that Souza was allowed to address the conference. "I can't get rid of my Down syndrome," she told participants. "But you can't get rid of my happiness. . . . It's doctors like you who want to test pregnant women and stop people like me [from] being born. You can't abort me now, can you? You can't kill me. Sorry!"[52] If any of the docs had dozed off during previous talks, they undoubtedly woke up for this one—and remembered it.

When Mimi and Tito Citarella were told—mistakenly, as it turned out—that their unborn child had severe brain damage, they made it clear that they would not abort her. Yet health professionals repeatedly pressured them to do just that, until Mimi finally blurted out: "What's going on here? Are you people Nazis or something?"[53] If enough parents ask that question, the eugenics enforcers may back off.

Medical professionals are not the only offenders, though. Bare acquaintances, and sometimes strangers, ask pregnant women if they plan to have prenatal testing. Friends and family members advise or even pressure them to have it. Some parents hear appalling and deeply hurtful comments both before and after the birth of their handicapped children. Former *Washington Post* reporter Patricia Bauer wrote about a time when her daughter Margaret, who has Down syndrome, was a little girl and was playing in a park. "New in town," Bauer recalled, "I had come to the park in hopes of finding some friends for myself and my little ones." What she found instead was a rude, cold, young woman who was at the park with her own children. The young woman looked briefly at Margaret, then said to the person beside her, but loudly enough that Bauer could hear: "Isn't it a shame that everyone doesn't get amnio?"[54]

A website called "Carrying to Term Pages" offers good advice on responding to such cruelty. The advice comes from "Jane," who received pressure for abortion when her daughter was diagnosed prenatally with a fatal condition. She suggests stressing the child's name: "The woman who sniped at me, 'When will it all be over with?' couldn't keep up that nasty tone when I replied, 'Emily's due date is July 3rd.'" If someone asked, 'Why aren't you terminating it?' she was ready with, 'You mean why aren't I terminating *Emily*?' And when a nurse asked her "why I was waiting so long to deliver": "I said in a very even tone of voice that I probably had 60 more years to live; Emily had four months. Four months wasn't a very long time, considering. She softened up after that." According to Jane, responding with dead silence and a furious stare "works on the worst offenders."[55]

The Can-Do Approach

There are many other websites—and also books and support groups—for parents who have children with disabilities. Some specialize in psychological support, but many offer practical advice as well. Shifting from eugenics to these resources is like walking out of a dark, dank cave into a sunny day. While they acknowledge the stress of dealing with major handicaps, the resources emphasize aid that's available. They highlight the great advances of recent decades in surgery, technical aids, education, and disability rights. They explain ways of helping children become as independent and self-reliant as they possibly can be. They show that children with disabilities—like all children—are dear and funny, unpredictable and deeply human. Thus, in *Chicken Soup for the Soul: Children with Special Needs*, one mother describes a visit to a doctor's office with her autistic son when he was six years old. After a nurse gave him a flu shot that he hadn't been warned about, "Nicholas was furious! All the way from the doctor's room and through the crowded waiting room, he was shouting: "That woman right there *hurted* me! She took a sword and stab me! Right here in my arm! You are in *big* trouble, lady! Say you are sorry! . . . You are in time-out until you say you are sorry!"[56]

The "Prenatal Partners for Life" website offers stories of parents who resisted pressures to abort for disability and are glad they did. It also has good advice for doctors, family, and friends on how to talk with parents about a prenatal diagnosis. A book called *My Child, My Gift* provides good advice and many stories. One mother recalls that "we just fastened our seatbelts and knew that, come what may, love would find a way. That's what love is." An Australian book, *Defiant Birth*, is a great resource and resolutely anti-eugenics.[57] There are at least two online directories of pro-life obstetricians. And support groups put new parents in touch with veterans

who can offer both practical advice and moral support.[58] For parents whose children are likely to die soon after birth, the "Perinatal Hospice" website has a directory of such hospice programs around the country.[59]

The *Babies with Down Syndrome* handbook includes helpful advice on government benefits, parents' estate planning, and special-needs trusts—information that may be useful in dealing with *any* major childhood disability. Some government websites also have useful information and show that there is far more public support available than many people realize.[60] There are also foundations and funds—the First Hand Foundation and the Disabled Children's Relief Fund, for example—that may help when other resources are exhausted.

Patricia Bauer's website is a great source on news stories about disability issues. And the "Disability Resources" site lists a vast number of practical resources. Also quite helpful is *Reflections from a Different Journey*, in which adults with disabilities write about their experience and what parents should know. A New Zealand contributor, Ross Flood, has cerebral palsy. When he was a baby, a doctor said that he would always be a "vegetable." Flood and his family proved the doctor wrong; the little boy grew up to obtain a university degree, drive a car, and become a professional writer. His chapter is called "Ain't Done Too Bad for a Cauliflower."

Some recent books explain disability to children so they won't be frightened by it and won't avoid children who have handicaps. *My Friend Has Down Syndrome*, for example, tells the story of two little girls who meet at summer camp. Like all good children's books, it is beautifully illustrated.[61] Perhaps, though, medical professionals and politicians need it more than the kids do.

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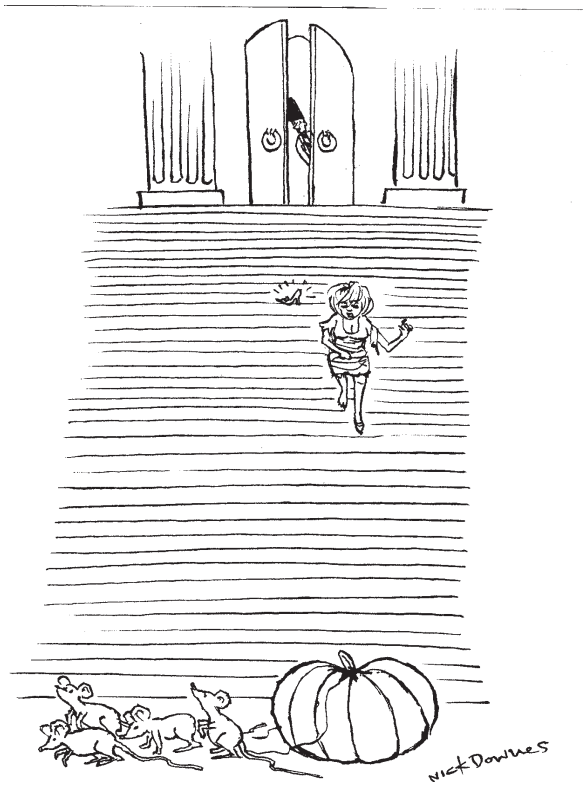

"*Darned Daylight Savings Time*!"

APPENDIX A

[*Timothy Dolan is the Archbishop of New York. The following column appeared Oct. 22, 2009 in* Catholic New York *and is reprinted with permission.*]

On the Front Lines for Life

Archbishop Timothy Dolan

"I wish I could tell you that Church leaders were brave, countercultural and prophetic," I can still hear him say, "but that would not be the truth."

"With very few exceptions," he went on, "Catholics in the United States did little or nothing to condemn the dramatically moral evil of slavery, and demand its end. And that is to our shame to this day."

Those words came from my mentor, friend and teacher, Msgr. John Tracy Ellis, the legendary professor of the history of the Catholic Church in the United States, during his sobering lecture on the Church and slavery, when I was a graduate student at The Catholic University of America in Washington, D.C.

Perhaps we have learned our lesson, for Catholic leaders—committed laity, religious sisters and brothers, clergy, bishops—have been on the front lines of the premier civil rights issue today, the right to life. And that is to our credit. And that's good to ponder during October, Respect Life Month.

The comparison of abortion to slavery is an apt one. The right of a citizen to "own" another human being as property—to control him/her, use him/her, sell him or decide her fate—was, prior to 1865, constitutional, sad to say.

That "right" to own a slave was even upheld by a decision of the U.S. Supreme Court (whose Chief Justice at the time, Roger Brooke Taney, was a Catholic, "personally opposed" to slavery!) in the infamous 1857 Dred Scott Decision, declaring that a slave who had escaped and claimed freedom had to be returned to his "master," because he had no rights at all.

Tragically, in 1973, in Roe v. Wade, the Supreme Court also strangely found in the constitution the right to abortion, thus declaring an entire class of human beings— now not African-Americans, but pre-born infants—to be slaves, whose futures, whose destinies, whose very right to life —can be decided by another "master." These fragile, frail babies have no civil rights at all.

Our faces blush with shame as we Catholics admit we did so little to end slavery; but we can smile and thank God that the Church has indeed been prophetic, courageous and counter cultural in the right to life movement. As an evangelical pastor recently commented to me, "We may criticize you Catholics for some things, but we have sure been inspired by your early and courageous leadership in the pro-life movement."

A few years ago, I met with a prominent philanthropist, who described himself—and I always know I'm in for trouble when I hear this—as a "former Catholic." Now, he went on to say, he was a "progressive," and would consider a large gift to the Catholic Church "if you changed your position on abortion."

I must admit I'm afraid I made no headway at all when I patiently tried to explain

to him that this was hardly a "position" of the Church that could change, but a conviction grounded in natural law, shared by most other world religions, and, for that matter, dramatically obvious in our American normative principles, which hold that certain rights are "inalienable"—part of the inherent human makeup—the first being the right to life itself.

Many issues and concerns in addition to protecting the baby in the womb fall under the rubric of the right to life—child care, poverty, racism, war and peace, capital punishment, health care, the environment, euthanasia—in what has come to be called the consistent ethic of life. All those issues, and even more, demand our careful attention and promotion.

But the most pressing life issue today is abortion. If we're wrong on that one, we're just plain wrong.

When our critics—and their name is legion—criticize us for being passionate, stubborn, almost obsessed with protecting the human rights of the baby in the womb, they intend it as an insult. I take it as a compliment.

I'd give anything if I could claim that Catholics in America prior to the Civil War were "passionate, stubborn, almost obsessed" with protecting the human rights of the slave. To claim such would be a fib. But, decades from now, at least our children and grandchildren can look back with pride and gratitude for the conviction of those who courageously defend the life of the pre-born baby.

I well remember being in Baltimore two years ago for the installation of their new archbishop, Edwin F. O'Brien, a native son of this archdiocese in whom we are very proud. He gave a stirring homily, recounting how his predecessors had often been on the forefront of promoting issues of justice in our country: Cardinal James Gibbons came up, of course, for his defense of the rights of labor back in the 1880s; Cardinal Lawrence Sheehan, who was jeered at a City Council meeting in 1965 for speaking on behalf of open housing for African-Americans; Cardinal William Keeler, criticized for advocating the rights of immigrants. And now, the new archbishop concluded, the tradition has to continue, as the Church must be on the front lines of the premier justice issue of the day: the protection of the right to life of the baby in the womb.

It's October, Respect Life Month.

APPENDIX B

[*Wesley J. Smith is a senior fellow in human rights and bioethics at the Discovery Institute. He also consults for the International Task Force on Euthanasia and Assisted Suicide and the Center for Bioethics and Culture. The following appeared Oct. 20, 2009 on National Review Online (nationalreview.com) and is reprinted with permission.*]

Hazardous Pathway

Wesley J. Smith

The United Kingdom continues to provide vivid warnings about the dangers of centralized health-care planning—a real possibility under Obamacare. Within the last few years, the U.K.'s notorious rationing board, the National Institute for Health and Clinical Excellence (NICE), urged hospitals, nursing homes, and hospices to follow an end-of-life protocol known as the Liverpool Care Pathway. The Pathway's guidelines instruct doctors to put patients thought to be near death into a drug-induced coma, after which all food and fluids, as well as medical treatments such as antibiotics, are withdrawn until death.

The problem with such a protocol is that no matter how well motivated—and undoubtedly, the Pathway's creators had good intentions—follow-the-dots medical protocols often lead to patients' being treated as members of a category rather than as individuals. At that point, nuance often goes out the door, and mistakes, neglect, and even oppression frequently follow.

That seems to be precisely what has happened with the Pathway as it has been applied in hospitals, nursing homes, and hospices throughout the U.K. Angry family members are beginning to come forward, charging that their loved ones have been sedated and had food and water withdrawn—whether their symptoms warranted these measures or not. Indeed, some have alleged that their deceased relatives would have lived but for having been put on the Pathway to death. These stories have all the early hallmarks of a full-fledged medical scandal.

The problems with the Pathway, at least as sometimes applied, first came to light in an open letter in the Daily Telegraph, signed by palliative physicians and others:

> Just as, in the financial world, so-called algorithmic banking has caused problems by blindly following a computer model, so a similar tick-box approach to the management of death is causing a national crisis in care. The government is rolling out a new treatment pattern of palliative care into hospitals, nursing homes, and residential homes. It is based on experience in a Liverpool hospice. If you tick all the right boxes in the Liverpool Care Pathway, the inevitable outcome of the consequent treatment is death.

A concurrent Telegraph story reported that 16.5 percent of patients who died in 2007–08 expired while under "continuous deep sedation," i.e., an artificial coma. That figure struck me as exceedingly high. I have spoken to several hospice professionals about "palliative sedation," as it is sometimes called, and all claimed that it is rarely necessary to treat pain or to relieve other distressing symptoms. And in

those few cases in which a patient must be rendered unconscious, the measure is undertaken so late in the disease process that it is generally not the cause of death.

In this regard, Dr. Eric Chevlen, a pain-control expert and former hospice medical director, told me: "In close to 30 years of practicing oncology and palliative care, I have treated hundreds of patients with opioids to relieve pain, accepting some level of sedation as an unavoidable side effect rather than the goal of therapy. But I can recall only a handful of times in which I felt that the best way I could reduce the patient's suffering was to intentionally diminish his level of consciousness."

This raises the suspicion that more dying patients are rendered unconscious in the U.K. due to the Pathway than would be warranted if each patient were treated based on his symptoms. If so, the Pathway protocols may be being applied in some cases without regard to proper proportionality of dosing based on each patient's need, and without adhering to Hippocratic standards of individualized care—both of which are important ethical concerns. Indeed, this practice raises the suspicion that the Liverpool Care Pathway may have become a platform for backdoor euthanasia. Tellingly, the Telegraph reported that twice as many patients in the U.K. die while under deep sedation as do in the Netherlands—a country where terminal sedation sometimes serves as a substitute for active euthanasia.

After the doctors' letter was published, Pathway supporters fought back, claiming that family members were actually quite satisfied with the treatment their loved ones had received, and had been relieved that the protocol allowed all to die in peace, without pain. That seemed to be the end of the matter—but then, the horror stories began to come to light.

On September 8, the Daily Telegraph carried a story in which one Rosemary Munkenbeck charged that after her father was hospitalized with a stroke, he was quickly deprived of fluids and medications. She further claimed that doctors wanted to sedate him with morphine until he died, under the Pathway protocols, but the family refused. Munkenbeck's father went five days until sustenance was restored, but the family isn't hopeful. "We believe that he has been forced down this route," she told the Telegraph. "By withdrawing fluids he is now very weak and there's no going back from it."

Soon, the Times of London reported another case:

> An 80-year-old grandmother who doctors identified as terminally ill and left to starve to death has recovered after her outraged daughter intervened. Hazel Fenton, from East Sussex, is alive nine months after medics ruled she had only days to live, withdrew her antibiotics and denied her artificial feeding. The former school matron had been placed on a controversial care plan intended to ease the last days of dying patients. Doctors say Fenton is an example of patients who have been condemned to death on the Liverpool care pathway plan. They argue that while it is suitable for patients who do have only days to live, it is being used more widely in the NHS, denying treatment to elderly patients who are not dying.

Fenton lived to tell the tale. Not so 76-year-old Jack Jones. Jones was hospitalized in the belief that his previous cancer had recurred and was now terminal. The

family claimed he was soon denied food and water and put into deep sedation. But his autopsy showed that he did not have cancer at all, but actually had a treatable infection. The hospice denied wrongdoing but paid £18,000 to Jones's widow.

This is precisely the paint-by-the-numbers medical approach that Obamacare threatens to bring across the pond to our shores. Indeed, former senator Tom Daschle—whom the New York Times called the most influential adviser to the president in the health-care debate—has long urged that America adopt NICE-style centralized medical planning. Indeed, according to Scott Gottlieb, writing in the Wall Street Journal, Daschle "argues that the only way to reduce spending is by allocating medical products based on 'cost effectiveness.' He's also called for a 'federal health board' modeled on the Federal Reserve to rate medical products and create central controls on access."

Chillingly, current Obamacare plans call for the creation of many cost/benefit/best-practices boards, the full power of which won't be fully known until the bureaucrats promulgate tens of thousands of pages of regulations between now and 2013, when the law would go into effect. Making matters more alarming, these boards would not only govern treatment provided in any public-option health plan, but would also be empowered to set the standards of care paid for by private insurance. Unless the final version of Obamacare is amended explicitly to prohibit such centralized health planning, don't be surprised if an American version of the Liverpool Care Pathway comes soon to a hospital or nursing home near you.

"It seems you're having trouble accepting the futility of existence."

APPENDIX C

[*Dr. David van Gend is the National Director of* Australians for Ethical Stem Cell Research (*www.cloning.org.au*). *The following "Afterword" was written this year to update his essay,"Prometheus, Pandora, and the Myths of Cloning"* (Human Life Review, *Summer/ Fall 2006*), *which will appear in an anthology of* Review *articles to be published in 2010.*]

Afterword: An Obituary for Human Cloning

David van Gend

On November 21, 2007, cloning as a serious science suddenly died, and was superceded by a technique so simple and powerful (and entirely ethical) that it has left the world of stem-cell research both stunned and elated. Observers reported it as "an earthquake for both the ethics and science of stem cells," and prominent cloning advocates called this discovery "the stem cell Holy Grail."[1]

Until November 2007 scientists believed that cloning an embryo was the only way to get hold of specialised pluripotent stem cells that exactly matched the patient, and would be uniquely useful for research. That argument—the sole serious justification for creating embryos in this inhuman way—no longer applies, and scientists no longer have any compelling reason to attempt human cloning.

Two teams of scientists—under Shinya Yamanaka in Japan and James Thomson in the United States—published a new technique of "reprogramming" adult cells to an embryonic state without ever creating or destroying a human embryo.[2] These "induced pluripotent stem cells" (iPS cells) show all the properties of embryonic stem cells (ESCs) from cloned embryos, but are obtained easily and ethically by simple manipulation of the skin cell of an adult.[3]

This is good news for science, which has still never been able to obtain a single stem cell by cloning embryos, and even better news for those of us who find it unthinkable that embryonic humans should be created with the sole purpose of destroying them in research.

It remains the case that adult stem cells (ASCs) can meet the basic needs of genetic research and drug testing, and it remains the case that only ASCs can be used directly in patients as treatment (since they have no tumour risk: Even the much-hyped Geron Corp trial does not in fact use ESCs, but only a bunch of nerve cells derived from ESCs which, they hope and pray, do not revert to ESCs and cause tumours).[4] Still, if the scientists will insist on having embryonic-type pluripotent stem cells to tinker with, let them at least get such cells by this new, innocent method.

The potential for this development to bypass the central ethical objection to cloning was recognized immediately by Professor Loane Skene, former Chair of the Lockhart Review which advised the Australian Government in 2005 to permit cloning.

On the day the iPS research was published she responded: "What this does is take away the step of using the egg, and creating the embryo which is particularly ethically contentious and it offers the opportunity to get stem cells that are matched to a particular person."

Most remarkable has been the graciousness with which leading advocates of cloning have accepted its demise, and moved towards the ethical new science of reprogramming adult cells.

First Professor Ian Wilmut, who cloned Dolly the sheep and holds the UK license to clone humans, announced in November 2007 that he was walking away from his cloning license in favour of iPS reprogramming, which he declared to be both "100 times more interesting" and "easier to accept socially."[5]

At the same time Professor James Thomson, who first discovered human embryonic stem cells, proved that these new iPS cells derived from human skin had every property of cloned embryonic stem cells, and declared "Isn't it great to start a field and then to end it?"[6]

And in January 2008 in the journal *Nature*, the former Director of Embryonic Stem Cell Research at the Australian National Stem Cell Centre, Professor Martin Pera, writes of "a new year and a new era." He describes a fruitful new phase where there is no conflict between stem-cell science and basic human dignity: "The generation of iPS cells through direct reprogramming avoids the difficult ethical controversies surrounding the use of embryos for deriving stem cells."[7]

There were initial concerns that the iPS technique used viral vectors which might provoke tumours, but further refinements have entirely removed the concern over cancer-causing viral factors.[8] As of May 2009 there are 212 fully defined iPS cell lines from human patients with some 13 different major diseases; there are of course no stem cell lines at all from human cloning.[9]

There are no remaining uses for cloning—only abuses—and because these abuses are now possible, they demand proactive legislation to ban the cloning of human embryos nationally and internationally.

We know that certain overseas doctors fully intend to be the first to bring a cloned embryo to birth. They are supported by academics like Melbourne's Daniel Elsner, who wrote in the prestigious *Journal of Medical Ethics* in 2006: "People who wish to reproduce by cloning should be permitted to do so, provided there is no reasonable alternative."[10]

And far worse, we have the sick proposal to farm cloned fetuses for their organs—proposed in the same journal by another Melbourne man, Julian Savulescu, who holds the Uheiro Chair of Practical Ethics at Oxford. In an article entitled "Cloning as a source of transplant tissue," he writes: "It is morally required that we employ cloning to produce embryos or foetuses for the sake of providing cells, tissues or even organs for therapy, followed by abortion of the embryo or foetus."[11]

These abuses are sure to be attempted by rogue doctors in less regulated countries. Therefore we need to revisit and empower the United Nations resolution of 2006 which called for a ban on human cloning.[12]

The Western Australian Parliament in February 2008 was the first major jurisdiction in the world to consider cloning since the iPS revolution, and it duly rejected the national legislation on cloning.

Such fair-minded politicians realise that we now have, in iPS technology, an

ethically uncomplicated and technically superior alternative to cloning, and that the putative justification for cloning no longer applies.

The Australian Federal Parliament faces a review of the legislation in 2010. We now have the chance to reverse the tide on national legislation which has been based on a scientific illusion. Our MPs can now support stem-cell science which gives us hope but does not degrade our humanity.

NOTES

1. http://www.abc.net.au/news/stories/2007/11/21/2096427.htm?section=world
2. Yamanaka http://www.nytimes.com/2007/11/21/science/21stem.html?r=4&ref=science&oref=slogin&oref=slogin
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5. Wilmut http://www.telegraph.co.uk/science/science-news/3314696/Dolly-creator-Prof-Ian-Wilmut-shuns-cloning.html
6. Thompson http://www.nytimes.com/2007/11/22/science/22stem.html?_r=2&adxnnl=1&oref=slogin&adxnnlx=1200529650-/3udVJCSOq5dSjn2cdoCJw
7. Pera http://www.nature.com/nature/journal/v451/n7175/full/451135a.html;jsessionid=A5F21F4CE69157CB1A2F39EB024C99B4
8. Virus-free iPS http://ethicalstemcellresearch.blogspot.com/2009/03/another-path-to-virus-free-ips-thomson.html
9. iPS cell lines http://ethicalstemcellresearch.blogspot.com/2009/05/for-scholars-ips-journal-references-up.html
10. Elsner http://jme.bmj.com/cgi/content/abstract/32/10/596
11. Savulescu http://jme.bmj.com/cgi/content/abstract/25/2/87
12. UN resolution (PDF 104kb) http://www.cloning.org.au/Documents/UN%20Declaration%-20on%20Human%20Cloning.pdf

"I was a teenage werewolf."

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